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No. _____

In The

Supreme Court of the United States

October Term, 1991

NEIL A. USEDEN, AS TRUSTEE OF THE AIR FLORIDA SYSTEM, INC., PROFIT SHARING PLAN AND TRUST,

Petitioner,

v.

GREENBERG TRAURIG HOFFMAN LIPOFF ROSEN & QUENTEL, SUN BANK, INC., AND SUN BANK OF MIAMI, INC.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was the Eleventh Circuit correct in concluding – contrary to the vast majority of circuit and district courts to consider the issue – that the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et. seq.* ("ERISA"), does not provide an ERISA plan with a monetary remedy against a non-fiduciary who knowingly participates in the plan fiduciary's breach of duty?

2. In ascertaining whether ERISA incorporates a monetary remedy against non-fiduciaries from the common law of trusts, is the focal point Congress' intent as determined using traditional methods of statutory analysis from cases such as *Cort v. Ash,* 422 U.S. 66 (1975), or was the Eleventh Circuit correct in ignoring *Cort v. Ash* and concluding that ERISA "should only incorporate a given trust law principle if the statute's text negates an inference that the principle was omitted deliberately from the statute"?

PARTIES TO THE PROCEEDING

Although the phrase "C. Edward Acker, et al., Defendants" appears in the caption of the officially reported Eleventh Circuit opinion, only Greenberg, Traurig, and the Sun Bank defendants, were parties to the appeal. The Secretary of Labor filed a brief as *amicus curiae* in support of the Petitioner's motion for rehearing and suggestion for rehearing *en banc*. Neither Petitioner nor the ERISA plan on whose behalf he sues is a corporation under Rule 29.1.

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Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

The petitioner, Neil A. Useden, Trustee, on behalf of the ERISA plan as a whole, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in the above-styled proceeding on December 11, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit, reported at 947 F.2d 1563, is reprinted in the Appendix at App. 1.

The first opinion of the United States District Court for the Southern District of Florida, reported at 721 F.Supp. 1233, is reprinted in the Appendix at App. 48.

The second opinion of the United States District Court for the Southern District of Florida, reported at 734 F.Supp. 978, is reprinted in the Appendix at App. 83.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on December 11, 1991. The petitioner's timely motion for rehearing and suggestion for rehearing *en banc*, was denied on March 4, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

ERISA § 409 (29 U.S.C. § 1109):

> **(a)** Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan

any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

. . . .

ERISA § 502(a),(*l*) (29 U.S.C. § 1132 (a),(1)):

(a) Persons empowered to bring a civil action

A civil action may be brought –

(1) by a participant or beneficiary –

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

. . . .

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (l) of this section.

. . . .

***(l)* Civil penalties on violations by fiduciaries**

(1) In the case of –

(A) any breach of fiduciary responsibility under (or other violation of) part 4 by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person,

the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1) –

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5) of this section.

(3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that –

(A) the fiduciary or other person acted reasonably and in good faith, or

(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of Title 26.

STATEMENT OF THE CASE

1. Jurisdiction

The jurisdiction of the district court was invoked under 29 U.S.C. § 1132(e) and (f) of ERISA which empowers district courts to award the relief provided

for in 29 U.S.C. § 1132(a). The appellate jurisdiction of the circuit court was invoked under 28 U.S.C. § 1292(b), which grants courts of appeal jurisdiction over interlocutory decisions of the district courts certified under Fed.R.Civ.P. 54(b) (App. 13-17, 90).

2. Petitioner's Factual Contentions Concerning Greenberg Traurig's and Sun Bank's Knowing Participation in the Plan Fiduciary's Breaches of Trust[1]

The Air Florida System, Inc., Profit Sharing Plan and Trust was established in 1977 as an ERISA Plan. Respondent Greenberg Traurig as counsel to Air Florida since the early 1970's, drafted the Plan, represented it from its inception, and arranged for Eli Timoner, the President of Air Florida, to be the Plan's initial, sole trustee. Greenberg Traurig and Timoner, the record suggests, thereafter participated in activities designed to further the illusion that Air Florida was solvent and

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[1] The case arrived in the circuit court as a summary judgment in the respondents' favor. The circuit court, however, never reached the question of whether the petitioner had demonstrated that triable issues of fact existed because it concluded that ERISA did not provide petitioner with a monetary cause of action against nonfiduciaries. Thus, the facts and reasonable inferences which follow have been stated in a light most favorable to the petitioner. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor."); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157, 158-159 (1970).

that all its stock was marketable, but which imprudently and illegally tied the Plan's financial integrity to Air Florida's declining fortunes.

In June 1981, the Plan borrowed $1.6 million from respondent Sun Bank to purchase a large block of Air Florida restricted stock which it then pledged, along with substantially all the unrestricted shares of Air Florida stock it owned, as collateral for the loan. Greenberg Traurig conducted a business prudency analysis of the stock purchase for the trustee and recommended the purchase. Greenberg Traurig, the evidence suggests, could not perform a disinterested business prudency analysis because of its primary loyalty to Air Florida. The trustee should not have purchased, and Greenberg Traurig should not have recommended the purchase of so much restricted Air Florida stock at a time Air Florida was insolvent, the airline business was volatile, and a decline in stock value, which was then a likely possibility, would have ruined the Plan.

In January 1982, as a result of business reversals suffered by Air Florida and the declining value of Air Florida's stock, Sun Bank demanded additional collateral and assurances from Air Florida which had begun to make the loan payments for the Plan. Timoner asked Greenberg Traurig whether Air Florida could collateralize and guaranty Sun Bank's loan to the Plan. Greenberg Traurig advised Timoner that Air Florida could not, under ERISA, guaranty a loan to a profit sharing Plan but could guaranty the loan if the Plan was changed to an Employee Stock Ownership Plan ("ESOP"). Greenberg Traurig began the changeover process but discontinued its efforts after it discovered

that the Plan could not legally be converted to an ESOP. Air Florida nevertheless guarantied Sun Bank's loan; and Greenberg Traurig counselled Timoner and his successor, Donald Lloyd-Jones – who, like Timoner, owed conflicting loyalties as Plan fiduciary and Chief Executive Officer of Air Florida – to continue their dealings with Sun Bank, as though the Plan was an ESOP, as though Air Florida was solvent, and as though Air Florida's steadily declining stock was a suitable investment for an ERISA plan.

When Sun Bank finally called its loan to the Plan and Air Florida's guaranty, in August 1982, Greenberg Traurig negotiated a redocumentation of the loan which it advised Lloyd-Jones to accept even though, as the circuit court concluded, the law firm "knew or should have known that the redocumentation (involving the reincorporation of the January pledge of corporate assets to secure the loan) offended applicable ERISA principles." (App. 10). Greenberg Traurig also knew or should have known that the redocumentation of the loan was in Air Florida's but not the Plan's economic interests, because the redocumentation saved Air Florida from having to honor its guaranty; and that Lloyd-Jones was breaching his fiduciary duty to the Plan by thus preferring Air Florida over the Plan with respect to the Sun Bank loan.

Sun Bank, the evidence suggests, likewise knew, prior to the August 1982 loan redocumentation, that the Plan was a profit sharing plan not an ESOP, that Air Florida could not guaranty the loan, and that Lloyd-

Jones should not have participated in the redocumentation unless the Plan was an ESOP. The Bank nevertheless demanded and received from Air Florida, whom the Bank also knew to be insolvent, a guaranty that the Bank was not legally able to receive under ERISA.

When the Plan was unable to pay loan installments after August 1982, and Air Florida, because of its deepening insolvency, chose neither to fund the Plan nor honor its guaranty, Sun Bank liquidated the Plan's collateralized stock. As a result of the decline in value of Air Florida stock and the liquidation of collateral, by the time Sun Bank's loan was satisfied in 1983 the assets of the 2000-member Plan, which stood at $3,340,000 in June 1981 had been, to use the circuit court's term, "dissipated," to $35,000 (App. 8).

3. The Opinions Below

The district court granted Greenberg Traurig's and Sun Bank's motions for summary judgment on the grounds, among others not relevant here, that ERISA does not provide a cause of action against non-fiduciaries who are not parties in interest,[2] for participation in a fiduciary's breach of duty (App. 75-79); and that, in

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[2] Petitioner alleged that Sun Bank and Greenberg Traurig were also liable as "fiduciaries," as well as non-fiduciary "parties in interest" under 29 U.S.C. § 1002(14) who engaged in "prohibited transactions" with a fiduciary under 29 U.S.C. § 1106. Although petitioner disagrees with the lower courts' legal and factual analyses, the courts' rulings on these matters are not the subject of this petition.

any event, the record was devoid of evidence that Sun Bank or Greenberg Traurig participated in any breach of duty by the Plan fiduciary (App. 77-79). The circuit court affirmed, holding that no cause of action exists "for monetary damages under ERISA sections 409(a) [29 U.S.C. § 1109] or 502(a) [29 U.S.C. § 1132(a)] for the participation of a non-fiduciary in a fiduciary breach." (App. 45). The circuit court, however, did not reach the issue of whether the record contained factual support for such a cause of action.

Relying primarily on *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985), for the theory that this Court "has unambiguously . . . restrain[ed] the grafting of novel remedies onto [ERISA]" (App. 38), the circuit court concluded that nothing in the "text" of ERISA suggests that Congress intended to allow a monetary remedy against non-fiduciaries. (App. 39-40). ERISA, the court stated, incorporates "a tailored law of trusts," which not only adopts and supplements "familiar trust principles" but "exempts from its reach certain parties and activities that may have been amenable to suit under traditional trust law." (App. 42).

Implicitly eschewing reliance on this Court's customary tests for determining whether Congress intended to imply a cause of action in a statute silent on the question, contained in cases such as *Cort v. Ash*, 422 U.S. 66 (1975), the circuit court formulated its own test to avoid "the unselective incorporation of trust law rules into ERISA." (App. 42-43): "[A] court should only incorporate a given trust law principle if the statute's text negates an inference that the principle was omitted deliberately from the statute." (App. 43). Since, the

court reasoned, the carefully crafted text of ERISA provides for certain remedies against nonfiduciaries, but does not include monetary damages among them, the inference that Congress intentionally omitted that remedy was not negated. The petitioner, therefore, had no cause of action for monetary losses to the Plan against Greenberg Traurig and Sun Bank[3] (App. 45).

REASONS FOR GRANTING THE WRIT

I

THE CIRCUIT COURT'S WHOLLY TEXTUAL ANALYSIS TO DETERMINE WHETHER ERISA INCORPORATES A CAUSE OF ACTION AGAINST NON-FIDUCIARIES CONFLICTS WITH THE DECISIONS OF THIS COURT WHICH REQUIRE A WIDE-RANGING INQUIRY INTO CONGRESSIONAL INTENT AND PURPOSE AS WELL AS AN ANALYSIS OF THE STATUTE'S TEXT.

The circuit court believed that a given trust law remedy is incorporated into ERISA only when ERISA's

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[3] Petitioner's motion to amend his complaint to add a cause of action against Sun Bank for knowing participation in a fiduciary breach was denied by the district court. The district court nevertheless chose to address the issue of Sun Bank's non-fiduciary liability in its opinion (App. 66 & n. 6). The circuit court similarly assumed, for purposes of its opinion, that the issue of Sun Bank's non-fiduciary liability was properly in the case (App. 37 & n. 20), but, in light of its conclusion that ERISA did not provide a cause of action, never reached petitioner's argument that the district court abused its discretion in denying him leave to amend (App. 47).

"*text* negates an inference that the principle was omitted deliberately from the statute" (App. 43) (emphasis supplied). Conspicuous among the significant shortcomings of this test is the fact that it is totally at variance with controlling decisions of this Court.

Cort v. Ash, 422 U.S. 66, 78 (1975) has long required a four-part analysis when determining "whether a private remedy is implicit in a statute not expressly providing one."[4] Even though the second factor in *Cort* – legislative intent – is now recognized as the most important of the four, the determination of congressional intent and purpose is precisely the inquiry that the circuit court's test ignores. *See Thompson v. Thompson*, 484 U.S. 174, 179 (1988) (In determining whether a remedy exists, "our focal point is Congress' intent in enacting the statute. As guides to discerning that intent, we have relied on the four factors set out in *Cort v. Ash* . . . along with other tools of statutory construction.").

Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134 (1985), on which the circuit court heavily relies, provides no support for the court's novel theory of statutory interpretation. *Massachusetts Mutual,*

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[4] "First, is the plaintiff one of the class for whose *especial* benefit the statute was enacted, . . . ? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, . . . would it be inappropriate to infer a cause of action based solely on federal law?" [citations omitted] 422 U.S. at 78.

473 U.S. at 140 n. 8, 144, 145-146, cites extensively to ERISA's legislative history as well as to *Cort v. Ash* in concluding that the text of ERISA, the structure of the statute "*and its legislative history* all support the conclusion that . . . Congress did not provide, and did not intend the judiciary to imply," a particular cause of action. *Id.* 473 U.S. at 148 (emphasis supplied). Nothing in *Massachusetts Mutual* suggests that the determination of congressional intent and purpose and the study of legislative history are no longer relevant in an ERISA analysis, or that every ERISA analysis must begin with the virtually insurmountable inference that a remedy not specifically mentioned in ERISA was deliberately omitted.

Indeed, in *Ingersoll-Rand Co. v. McClendon*, ___ U.S. ___, 111 S.Ct. 478 (1990), this Court specifically rejects the precise assumption on which the circuit court's 'negative inference' test rests – that an omitted ERISA remedy in a silent statute is presumed to have been omitted deliberately. There, the Texas Supreme Court reasoned that because ERISA did not specifically subsume the remedies of lost future wages, mental anguish and punitive damages which the plaintiff sought for his wrongful discharge, his state law cause of action was not preempted. *McClendon v. Ingersoll-Rand Co.*, 779 S.W.2d 69, 71 n.3 (Tex. 1989).

This Court disagreed stating that 29 U.S.C. § 1132(a) provided the exclusive remedy for McClendon's wrongful termination claims *and* the extra-contractual remedies he sought:

> Not only is § 502(a) [§ 1132(a)] the exclusive remedy for vindicating § 510 [§ 1140]-protected rights, there is no basis in § 502(a)'s language for limiting ERISA actions to only those which seek "pension benefits." It is clear that the relief requested here is well within the power of federal courts to provide.

Ingersoll-Rand Co. v. McClendon, 111 S.Ct. at 486. *Ingersoll-Rand* thus illustrates how causes of action and remedies, including monetary remedies, not specifically set forth or described in ERISA will nevertheless be implied to afford complete relief under the Act.

A.

The Circuit Court's Decision Conflicts With Decisions of this Court Which Define the Basic Rules of Statutory Construction Applicable to Remedial and Equitable Legislation Like ERISA.

Overarching every textual analysis of ERISA must be an awareness that ERISA is quintessentially remedial legislation. *Smith v. CMTA-IAM Pension Trust*, 746 F.2d 587, 589 (9th Cir. 1985); *Rettig v. Pension Benefit Guaranty Corp.*, 744 F.2d 133, 155 n. 54 (D.C.Cir. 1984); *Brock v. Gerace*, 635 F.Supp. 563, 566 (D.N.J. 1986). Remedial legislation must be construed "liberally," *Peyton v. Rowe*, 391 U.S. 54, 65 (1968), and "broadly to effectuate its purposes." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). The Eleventh Circuit's test, which saddles ERISA participants and beneficiaries with the onerous burden of disproving, from ERISA's text *alone*,

the inference that a remedy was intentionally omitted, is anything but liberal and remedial-minded.

An equally important starting point in every ERISA analysis is an awareness that in applying ERISA's law of trusts, a federal court sits primarily as a court of equity. Because equitable jurisdiction is inherently flexible in order to shape the remedy to the wrong, "Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). *See Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291-292 (1960) ("When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes."); *Katchen v. Landy*, 382 U.S. 323, 338 (1966) ("[E]quity courts have power to decree complete relief and for that purpose may accord what would otherwise be legal remedies.") The Eleventh Circuit's highly restrictive negative inference test is fundamentally inconsistent with these well-settled principles for interpreting the remedial scope of a court's equitable jurisdiction.

Congress "obviously did not expressly address all the issues that might arise" under ERISA, *Thornton v. Evans*, 692 F.2d 1064, 1079 (7th Cir. 1982); *Massachusetts v. Morash*, 490 U.S. 107, 113 (1989) ("The precise coverage of ERISA is not clearly set forth in the Act."). The circuit court ignored this Court's precedents, Congress' intent, and the "inevitable incompleteness

presented by all legislation," *United States v. Lake Misere Land Co.*, 412 U.S. 580, 593 (1973), by formulating a rule of statutory construction that is incapable of implementing ERISA's equitable and remedial scheme.

II

THE CIRCUIT COURT MISREAD THE TEXT OF ERISA WHICH ALLOWS A MONETARY CAUSE OF ACTION AGAINST NON-FIDUCIARIES UNDER SUBSECTIONS 1132(a)(2), OR (a)(3), OR BOTH.

With the addition of 29 U.S.C. § 1132(*l*) by the 1989 Omnibus Budget Reconciliation Act amendments, P.L. 101-239, Congress' assumption that ERISA has always afforded a monetary remedy against non-fiduciaries became readily apparent. Section 1132(*l*)(1)(B) provides that where a non-fiduciary knowingly participates in a fiduciary's breach or violation, the Secretary of Labor shall assess a civil penalty against the non-fiduciary in an amount equal to 20 percent of the "applicable recovery amount." The term "applicable recovery amount" is defined in § 1132(*l*)(2) to mean any "amount" recovered from a non-fiduciary pursuant to a settlement agreement with the Secretary or "ordered by a court to be paid by such [non-fiduciary] to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5) of this section."

Section 1132(*l*) clearly does not *create* a monetary cause of action against non-fiduciaries in subsections 1132(a)(2) or (a)(5). Congress obviously believed that

such a cause of action already existed and simply authorized an additional administrative penalty or surcharge on any monetary award or settlement the Secretary might independently recover under those subsections from a non-fiduciary.

Since a "participant, beneficiary or fiduciary," as well as the Secretary, may bring an action for "appropriate relief" under § 1132(a)(2), Congress' assumption that the Secretary had a preexisting cause of action against non-fiduciaries under § 1132(a)(2), necessarily means that participants, beneficiaries and fiduciaries possess the same cause of action under that subsection. Nothing in § 1132(a)(2) suggests that participants, beneficiaries and fiduciaries have fewer trust remedies under that subsection than the Secretary.

Furthermore, since Congress assumed that the Secretary already possessed a monetary remedy against non-fiduciaries under § 1132(a)(2) *and* under § 1132(a)(5), and the essential text of subsection (a)(5) is identical to that of subsection (a)*(3)*, it follows that any monetary remedy available to the Secretary against non-fiduciaries under subsection 1132(a)(5) is necessarily available to participants, beneficiaries and fiduciaries under subsection 1132(a)(3), as well.[5] *See*

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[5] Even before the addition of Section 1132(*l*) confirmed a cause of action against non-fiduciaries in subsection 1132(a)(2), subsection 1132(a)(3) was sufficiently broad to encompass a monetary remedy against non-fiduciaries under its provision for "other appropriate equitable relief . . . (ii) to enforce any provisions of this subchapter." The provisions

(Continued on following page)

Pension Fund – Mid Jersey Trucking Industry – Local 701 v. Omni Funding Group, 731 F.Supp. 161, 178 n. 11 (D.N.J. 1990) (The phrase "other appropriate equitable relief" in subsections 1132(a)(3) and (a)(5) should be accorded the same meaning whether the Secretary or a private party brings the enforcement action).

Nothing in ERISA's legislative history, either, suggests that only the Secretary of Labor should possess a cause of action against non-fiduciaries. Indeed, in H.R. Conf. Rep. 386, 432-433, *reprinted in* 1989 U.S. Code Cong. & Admin. News 3018, 3035-3036, the conferees, noting the limited resources of the Secretary of Labor to monitor the vast numbers of ERISA plans and the Labor Department's growing emphasis on deterrence rather than enforcement, state: "[We] believe that the need for strengthened enforcement and deterrence of violations of ERISA applies not only to the Department of Labor, but to judicial oversight of private rights of action affecting employee benefit plans." *See Central*

(Continued from previous page)

that a monetary remedy against non-fiduciaries under subsection 1132(a)(3) would enforce include among others, (a) Congress' declarations of policy in § 1001(b), "providing for appropriate remedies, sanctions, and ready access to the Federal courts" to assure the "financial soundness" of ERISA plans under § 1001(a); (b) the provisions of § 1103(a) requiring all plan assets to remain under the trustee's control; (c) the provisions of § 1103(c)(1) requiring plan assets to be "held for the exclusive purposes of providing benefits to participants . . . and their beneficiaries"; and (d) the provisions of § 1104 requiring a fiduciary to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries."

States, Pension Fund v. Central Transport, 472 U.S. at 578 ("[T]he structure of ERISA makes clear that Congress did not intend for Government enforcement powers to lessen the responsibilities of plan fiduciaries").[6]

The Eleventh Circuit's general reliance on *Massachusetts Mutual Life Ins. Co. v. Russell* for its determination that the text of §§ 1132(a)(2) and (a)(3) does not support a monetary remedy against non-fiduciaries has been thoroughly undercut by *Ingersoll-Rand v. McClendon*, 111 S.Ct. at 486. *Ingersoll-Rand*, although speaking of monetary remedies under § 1132(a) generally, had to be referring to § 1132(a)(3), which was the only possible section under which McClendon could have (a) sued his employer for wrongful termination and (b) recovered more than simply benefits under the terms of his plan. Thus, the Eleventh Circuit's conclusion that the phrase "other appropriate equitable relief" in § 1132(a)(3) bars a monetary remedy is not only

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[6] That the Department of Labor, from *Freund v. Marshall & Ilsley Bank*, 485 F.Supp. 629 (W.D.Wisc. 1979) – a lawsuit initiated by the Secretary of Labor in 1976 – to *Dole v. Compton*, 753 F.Supp. 563 (E.D.Pa. 1990), and beyond, continuously prosecuted, and recovered monetary damages from, participating non-fiduciaries, shows a consistent and reasonable administrative interpretation of ERISA to which the Eleventh Circuit should have deferred. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984). Congress' failure to legislatively negate the Department's assumption that it possessed a monetary cause of action against non-fiduciaries is "evidence that Congress at least acquiesces in, and apparently affirms that assumption." *Cannon v. University of Chicago*, 441 U.S. 677, 687 & n.8, 702-703 (1979).

inconsistent with traditional trust law, but is now suspect under the statutory law of ERISA as well. *Ingersoll-Rand's* gloss on § 1132(a), coupled with the persuasive implications of § 1132(*l*), clearly demonstrate that a monetary cause of action against non-fiduciaries is available under ERISA.

A.

The Circuit Court's ERISA Analysis Conflicts With the Vast Majority of Courts Which Have Allowed or Would Allow a Monetary Remedy Against a Non-fiduciary Who Knowingly Participates in a Fiduciary's Breach.

Virtually every court to consider the issue of non-fiduciary liability has concluded from its review of ERISA's legislative history and Congress' purpose in enacting ERISA that a federal court has the power under subsections 1132(a)(2), or (a)(3), or both, to impose monetary and restitutionary remedies against culpable non-fiduciaries. *See, e.g. Whitfield v. Lindemann*, 853 F.2d 1298, 1303 (5th Cir. 1988), *cert. denied sub nom. Klepak v. Dole*, 490 U.S. 1089 (1989); *Brock v. Hendershott*, 840 F.2d 339, 342 (6th Cir. 1988); *Lowen v. Tower Asset Management, Inc.*, 829 F.2d 1209, 1220-1221 (2nd Cir. 1987); *Fink v. National Savings & Trust Co.*, 772 F.2d 951, 958 (D.C. Cir. 1985); *Thornton v. Evans*, 692 F.2d at 1078-1080; *Eaves v. Penn*, 587 F.2d at 462-463; *Dole v. Compton*, 753 F.Supp. 563, 568-569 (E.D.Pa. 1990); *Diduck v. Kaszycki & Sons Contractors, Inc.*, 737 F.Supp. 792, 804 (S.D.N.Y. 1990); *Pension Benefit Guaranty Corp. v. Ross*, 733 F.Supp.

1005, 1007-1008 (M.D.N.C. 1990); *Pension Fund-Mid Jersey Trucking Industry-Local 701 v. Omni Funding Group*, 731 F.Supp. at 176-179; *Benvenuto v. Schneider*, 678 F.Supp. 51, 54-55 (E.D.N.Y. 1988); *Brock v. Gerace*, 635 F.Supp. at 566-567; *Foltz v. U.S. News & World Report, Inc.*, 627 F.Supp. 1143, 1167-1168 (D.D.C. 1986); *Donovan v. Schmoutey*, 592 F.Supp. 1361, 1395-1396 (D.Nev. 1984); *Donovan v. Bryans*, 566 F.Supp. 1258, 1266-1267 (E.D.Pa. 1983); *Donovan v. Daugherty*, 550 F.Supp. 390, 410-411 (S.D.Ala. 1982); *Freund v. Marshall & Ilsley Bank*, 485 F.Supp. 629, 641-643 (W.D.Wisc. 1979).

In sharp contrast to these cases, and others with similar holdings, are the decision below, the opinion in *Framingham Union Hospital, Inc. v. Travelers Ins. Co.*, 744 F.Supp. 29 (D.Mass. 1990), and a series of cases in the Ninth Circuit typified by *Mertens v. Hewitt Associates*, 948 F.2d 607 (9th Cir. 1991),[7] *Batchelor v. Oak Hill Medical Group*, 870 F.2d 1446 (9th Cir. 1989) and *Nieto v. Ecker*, 845 F.2d 868 (9th Cir. 1988). The Ninth Circuit cases, like the present case, misconstrue the

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[7] A petition for certiorari, Case No. 91-1671, was filed in this Court in *Mertens v. Hewitt Associates*, on April 14, 1992. The "Question Presented" in *Mertens* – "Does ERISA § 502(a)(2) and/or (a)(3), 29 U.S.C. § 1132(a)(2) and (3), allow pension plan participants and beneficiaries to bring an action on behalf of a retirement plan for recovery of monetary losses against a non-fiduciary service provider who knowingly participates in breaches of fiduciary duty committed by an ERISA fiduciary?" – will also be dispositive of the first question presented in this case.

text of ERISA itself as shown in Point II, *supra*, misapply *Massachusetts Mutual v. Russell*, and ignore persuasive indications in ERISA's legislative history of Congress' intent to incorporate into ERISA any trust remedy that will prevent losses to plans and beneficiaries.

III.

THE CIRCUIT COURT FAILED TO DETERMINE OR IMPLEMENT CONGRESS' INTENT AND PURPOSE IN ENACTING ERISA WHICH WAS TO BROADLY FEDERALIZE REMEDIES TRADITIONALLY AVAILABLE UNDER THE LAW OF TRUSTS FOR THE PROTECTION OF ERISA PLANS AND BENEFICIARIES.

The legislative history of ERISA demonstrates that Congress intended through ERISA to codify principles and remedies from the law of trusts in order to fully protect plan participants and beneficiaries from breaches of trust by Plan fiduciaries. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109-110 (1989); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987); *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.* 472 U.S. 559, 570, 572 (1985). As recently as 1989, a House Committee reporting on the ERISA amendments in the Omnibus Budget Reconciliation Act in H. R. Rep. No. 247, 101st Cong. 1st Sess. 56, *reprinted in* 1989 U.S. Code Cong. & Admin. News 1906, 1948, stated:

> The Committee reaffirms the authority of the Federal courts to shape legal and equitable remedies to fit the facts and circumstances of

> the cases before them, even though those remedies may not be specifically mentioned in ERISA itself.

The House Conference Report, H.R. Conf. Rep. 386, 101st Cong. 1st Sess. 433, 1989 U.S. Code Cong. & Admin. News at 3036, likewise concluded that:

> It remains the intent of Congress that the courts use their power of [sic] fashion legal and equitable remedies that not only protect participants and beneficiaries but deter violations of the law as well. The conferees expect that the executive agencies and the courts will use their substantial authority to achieve these goals and to safeguard the rights of plan litigants.

Thus, unlike *Massachusetts Mutual v. Russell*, 473 U.S. at 145, where a voluminous legislative history "contradict[ed] respondent's assertion" that ERISA provided a particular remedy, here ERISA's legislative history is consistent with a monetary remedy against a non-fiduciary who causes losses to plan participants and beneficiaries.[8]

Traditional trust law "provides for broad and flexible equitable remedies in cases involving breaches of fiduciary duty." *Eaves v. Penn*, 587 F.2d at 462. The liability of a non-fiduciary who participates in a fiduciary's breach of trust is well-settled in the law of trusts. A non-fiduciary who knows or should know that he is

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[8] *See, e.g.*, the legislative history of the 1974 Act discussed in *Eaves v. Penn*, 587 F.2d 453 (10th Cir. 1978).

furthering or aiding a breach of trust is individually liable, as well as jointly liable with the fiduciary, to the beneficiaries of the trust. The non-fiduciary's liability, like the trustee's liability, extends to all losses and damages caused by the breach of trust and has never been limited to non-monetary remedies. The traditional flexibility of equitable remedies is intended precisely to allow a beneficiary to be restored to the position, financial and otherwise, he would have been in had the breach of trust not occurred. *See Restatement (Second) of Trusts* §§ 205, 297, 326 (1959); 4 A. Scott, *The Law of Trusts* §§ 282, 326 (W. Fratcher 4th ed. 1989); G. G. Bogert & G. T. Bogert, *The Law of Trusts and Trustees* §§ 861, 868, 901 (Rev. 2d ed. 1982).

A.

The Circuit Court's Decision Conflicts With *Firestone Tire & Rubber Co. v. Bruch* Which Requires ERISA to Provide Beneficiaries With Trust Remedies That Are Not Less Favorable to Them Than the Remedies They Would Have Enjoyed Before ERISA.

ERISA was enacted "to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 90 (1083). The Eleventh Circuit's interpretation of ERISA, which denies plan beneficiaries a monetary remedy against non-fiduciaries who aid the fiduciary in harming the plan, not only fails to "promote" their interests, but strips them of their pre-ERISA trust remedies. ERISA, as this Court concluded in *Firestone Tire &*

Rubber Co. v. Bruch, 489 U.S. at 112, should not operate in this fashion. In *Firestone* the Court justified its incorporation of a principle of trust law by observing that adoption of the principle would be "consistent with the judicial interpretation of employee benefit plans prior to the enactment of ERISA." In rejecting Firestone's argument for an alternative principle, the Court likewise stated that Firestone's theory "would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted." *Id.* at 114.

Before ERISA was enacted pension and welfare plan beneficiaries had an unquestioned right to sue non-fiduciaries who participated in fiduciaries' breaches of trust for monetary losses to their plans. *See, e.g., Nedd v. United Mine Workers of America*, 556 F.2d 190, 209 (3rd Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978) ("The concept of liability for knowing participation in a breach of trust is well recognized"); *Blankenship v. Boyle*, 329 F.Supp. 1089, 1099, 1110 (D.D.C. 1971), later case, 337 F.Supp. 296 (D.D.C. 1972); *Booth v. Security Mutual Life Ins. Co.*, 115 F.Supp. 755, 761-762 (D.N.J. 1957). The Eleventh Circuit's conclusion that ERISA offers trust beneficiaries less protection against non-fiduciaries than they possessed before ERISA is thus an illogically regressive, and therefore incorrect, reading of that highly remedial statute, and of this Court's decision in *Firestone*.

IV

THE IMPORTANCE OF A RESOLUTION OF THE NON-FIDUCIARY LIABILITY ISSUE IN THIS CASE TO THE EFFECTIVE ENFORCEMENT OF ERISA JUSTIFIES THIS COURT'S EXERCISE OF JURISDICTION.

ERISA has become such an all-encompassing and preemptive presence in the law of employee welfare and pension plans that any exclusion from the Act's remedial reach must be closely scrutinized for its consistency with Congress' intent and purpose. Courts must be sensitive to the problem of creating unnecessary gaps in ERISA's remedial scheme for plaintiffs, like the present petitioner, caught between ERISA's preemption clause[9] and a narrow judicial reading of ERISA's remedies. Here, the Eleventh Circuit's interpretation of § 1132(a) has deprived the petitioner, an ERISA plan trustee, of a remedy that he cannot assert in another forum, and that he may well need – if the fiduciaries prove insolvent or unavailable – to make the plan whole.

Non-fiduciary monetary liability is not a vestigial appendage to ERISA, but embodies the full measure of ERISA's prohibitions against fiduciary wrongdoing. Errant non-fiduciaries are virtually always the partners,

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[9] In the Eleventh Circuit, for example, ERISA would undoubtedly have preempted the petitioner's state law tort or breach of trust claims against the respondents. *See, e.g., Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983); *Howard v. Parisian, Inc.*, 807 F.2d 1560 (11th Cir. 1987).

advisors, or transferees of errant fiduciaries. It simply makes no sense, as traditional trust law has long recognized, to provide monetary remedies against the unfaithful fiduciary but not against his aiders and abettors without whose participation the fiduciary breach and the monetary loss to the beneficiaries would not or could not have occurred.

The Eleventh Circuit has created an anomalous gap in ERISA's remedial scheme, where Congress did not intend one to exist, by absolving non-fiduciaries from monetary liability for their participation in fiduciary breaches. This Court should take jurisdiction to correct the Eleventh Circuit's mistaken and harmful interpretation of ERISA and resolve the conflict among the circuits.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

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APPENDIX

Opinion of the Eleventh Circuit Court of Appeals in *Useden v. Acker,* 947 F.2d 1563 ..App. 1

Opinion of the District Court, Southern District of Florida, in *Useden v. Acker,* 721 F.Supp. 1233 ..... App. 48

Opinion of the District Court, Southern District of Florida, in *Useden v. Acker,* 734 F.Supp. 978 ..... App. 83

Order of the Eleventh Circuit Court of Appeals in *Useden v. Acker,* denying rehearing and suggestion of rehearing *en banc* ..... App. 91

Neil A. USEDEN, As Trustee of the Air Florida System, Inc., Profit Sharing Plan & Trust, Plaintiff-Appellant,

v.

C. Edward ACKER, et al., Defendants,

Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., Sun Bank of Miami, N.A. and Sun Bank, Inc., Defendants-Appellees.

No. 90-5445.

United States Court of Appeals,
Eleventh Circuit.

Dec. 11, 1991.

Before HATCHETT and BIRCH, Circuit Judges, and RONEY, Senior Circuit Judge.

BIRCH, Circuit Judge:

In this appeal we decide whether the conduct of a bank and a law firm renders those entities fiduciaries under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (1988) ("ERISA" or "Act"). We also decide whether ERISA provides a right of action for monetary damages against non-fiduciaries who knowingly participate in a breach by a fiduciary.

Plaintiff-appellant Neil A. Useden, as trustee to a profit sharing plan and trust (the "Plan") governed by ERISA, appeals the grant of summary judgment by the United States District Court for the Southern District of Florida in favor of defendant-appellees Sun Bank and Greenberg, Traurig. In his Order on Motions for Summary Judgment, Judge Kenneth L. Ryskamp determined that, on the undisputed facts, neither Sun Bank

as a lender to the Plan nor the law firm of Greenberg, Traurig as attorneys for the Plan were fiduciaries of the Plan within the meaning of ERISA. The court also determined that no cause of action lay against defendant Greenberg, Traurig as a non-fiduciary who knowingly participated in a breach by a fiduciary. Further, Judge Ryskamp believed that the undisputed facts did not support such non-fiduciary liability notwithstanding the rejection of plaintiff's legal theory.

In its appeal, the Plan additionally assigns error to the district court's denial of leave to amend the Plan's complaint to include a cause of action for non-fiduciary liability against Sun Bank, the court's striking of the untimely affidavit of a former trustee to the Plan, the court's finding that extracontractual and punitive damages were unavailable under the ERISA theories asserted, and finally, the court's conclusion that Regulation U, 12 C.F.R. § 221 (1990) (pertaining to the Federal Reserve Board's "margin rules"), did not provide a borrower with a private right of action for damages. We agree with the district court's finding that the conduct of these defendants did not make them fiduciaries. We also hold that the plain meaning of ERISA does not impose liability on non-fiduciaries for acting with fiduciaries who breach fiduciary duties. Finding no error with respect to the remaining issues, we AFFIRM.

I. FACTUAL AND PROCEDURAL BACKGROUND

Air Florida System, Inc. and Air Florida, Inc. (collectively "Air Florida") established the Air Florida

System, Inc. Profit Sharing Plan and Trust in 1977 as an "eligible individual account plan" under ERISA. The Plan's mission was to absorb contributions made by Air Florida as an employer, to invest exclusively in the securities of Air Florida, and to distribute these securities to eligible Plan participants. Useden, the current named trustee of the Plan, was appointed in May 1984. Useden instituted the present action in January 1985 after determining that the Plan's assets had been dissipated through a series of financial transactions entered into by his predecessors. These transactions involved Sun Bank and Greenberg, Traurig in their respective capacities as a lending bank and attorneys to the company and the Plan.

Because Useden's predecessors were also officers of Air Florida, they not only presided over the financial decline of the Plan, they also over-saw the demise of the airline. The trustee of the Plan from creation to July 1982 was Eli Timoner, who was Air Florida's President and Chief Operating Officer and later its Chief Executive Officer and Chairman of the Board. Timoner's successor, Donald Lloyd-Jones, assumed his duties as trustee of the Plan some time after Timoner suffered a debilitating stroke in July 1982. Lloyd-Jones also assumed all of Timoner's corporate duties upon Timoner's stroke.[1]

By the time Useden became Plan trustee in May 1984, Air Florida was in protracted state of financial

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[1] The record discloses some dispute, however, as to exactly when Lloyd-Jones actually stepped into the position of Plan trustee that was left vacant by Timoner's stroke.

distress. A number of events precipitated the airline's crisis. The August 1981 departure of Chief Executive Officer and Chairman of the Board Edward Acker, a recognized industry personality who brought clout and expertise to the fledgling airline, was a highly adverse development. The August 1981 strike of the Professional Air Traffic Controllers and the attendant reductions in operating levels also had its costly effects. During 1981, in addition, Pan American World Airways waged a fare war on Air Florida's crucial New York to Miami route. Also damaging was the public relations disaster that ensued when an Air Florida aircraft crashed on takeoff from National Airport in January 1982. In July 1984, Air Florida filed for bankruptcy.

Within the context of the adverse events of the early 1980's and the accompanying financial decline of Air Florida, the Plan's investments in Air Florida securities also deteriorated. For their part in the transactions underlying these investments, Sun Bank and Greenberg, Traurig are now sued by the Plan under ERISA and related legal theories. The chief theories upon which Useden proceeds are conceptually unified insofar as they all require a determination that the defendants' professional functions so penetrated the governance of the Plan that they should share the potential liability of the Plan's named fiduciaries.

1. Sun Bank

During the period relevant to this litigation, Sun Bank was in a commercial lending relationship with

both the Plan and Air Florida. Sun Bank's first pertinent involvement with the Plan revolved around a nine-month, short term loan of $1.6 million issued in June 1981. The Plan used the loan to purchase 76,000 discounted shares of Air Florida stock from Great American Life Insurance Company ("GALIC"). Because GALIC was then presently in the process of disposing of the greater part of its substantial holdings in Air Florida, the Plan was able to acquire GALIC's restricted (but preferred) shares at the same discounted price that GALIC had made available to another buyer. The Plan intended to repay the loan with the Air Florida contributions to the Plan earmarked to be made in early 1982. The collateral pledged to secure the loan was comprised of the 76,000 purchased shares plus 40,000 shares of common Air Florida stock already owned by the Plan.

At closing, Sun Bank took possession of the stock collateral. At that time, certain powers governed by the terms of the loan and banking industry custom vested in Sun Bank. First, the loan documents, in addition to the promissory note and related documents, included an agreement between Plan sponsor Air Florida and Sun Bank whereby the company would, in the event of a default on the loan, produce an S-16 registration statement as required under applicable securities laws. This statement would enable Sun Bank to sell the stock held as collateral; absent such registration, the loan collateral would be subject to a two-year holding period. Second, the bank gained authority to require additional collateral and to convert the preferred shares into

common in the event of a monetary default.[2] The bank implemented these insecurity provisions within the framework of a 70% margin call, a convention in commercial lending whereby the Plan could be required to furnish additional collateral should the value of the collateral stock fall below 130% of the loan balance.[3]

In January 1982, the value of the stock pledged as collateral on the loan fell below the 130% margin requirement. Thus, in the same month that Air Florida was greeted with news that one of its airplanes had crashed on takeoff in Washington, D.C., the Plan was informed by Sun Bank that the contemporaneous decline in the market value of Air Florida stock necessitated additional collateral under the margin requirements of the loan. Due to this shortfall in collateral, Plan sponsor Air Florida undertook to guaranty the loan to the Plan.

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[2] These powers were embodied in two clauses of the agreement: an "additional collateral" clause, enabling the bank to require additional collateral when it deemed existing collateral to be unsatisfactory, and an "insecurity clause," giving the bank the power to declare a default when it deemed itself insecure.

[3] There is some dispute as to whether the 70% margin call trigger for Sun Bank's powers under the "insecurity clause" was the subject of an oral agreement between the parties, or rather was a banking convention that Sun Bank simply assumed to be in effect and later unilaterally imposed. For purposes of Useden's appeal from summary judgment in favor of the defendants, we must accept Useden's version – that the 70% margin call was unilaterally imposed by the bank. *Bishop v. Wood,* 426 U.S. 341, 347 & n. 11, 96 S.Ct. 2074, 2079 & n. 11, 48 L.Ed.2d 684 (1976).

In the opinion of the Plan attorneys, Greenberg, Traurig, ERISA prohibited the guaranty of a loan to a profit sharing plan by that plan's sponsor.[4] Air Florida, therefore, passed a resolution to effect the conversion of the existing profit sharing plan into an Employee Stock Ownership Plan ("ESOP"). Presumably, with the Plan structured as an ESOP, the guaranty by Air Florida would be permissible. Air Florida then guaranteed the $1.6 million loan. Due to the continuing decrease in the value of the stock originally pledged as collateral and the persistent out-of-margin status of the loan, both the Plan and Air Florida pledged additional collateral at various times during the first half of 1982.

Hopes for timely repayment of the outstanding loan obligation were finally dashed in early March 1982, when Air Florida informed Sun Bank that the airline would forego the contribution to the Plan slated for early 1982, manifestly rendering the Plan unable to satisfy its obligation on the loan before the passing of the March 26 maturity date. Sun Bank, following negotiations with the Plan, renewed the underlying promissory note in June 1982 and set a due date of March 31, 1983. As a result of the negotiations that continued through this time, some $297,000 of cash collateral then being held was applied to reduce the outstanding loan balance of $1.6 million.

Sun Bank's insecurity persisted. As a result, in August 1982 Sun Bank demanded full payment on the

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[4] *See* ERISA section 406, 29 U.S.C. § 1106(a)(1)(B) (1988).

principal loan balance. Negotiations that ensued between the bank and the Plan cumulated in an amendment and redocumentation of the loan, with satisfaction of the outstanding balance set to be due, once again, on March 31, 1983. In the fall of 1982, Sun Bank exercised its power to sell stock held as collateral in order to reduce the outstanding balance. Again, in July 1983, Sun Bank liquidated collateral after the Plan defaulted on the loan by failing to satisfy the full balance on March 31. The unsold collateral, in the form of Air Florida preferred and common stock, was then returned to the Plan.

The decline in the value of Air Florida stock and Sun Bank's liquidation of collateral consumed the Plan economically. By year end 1983, net available assets held by the Plan had been dissipated from a June 1981 level of $3,340,000 to $35,000.

2. Greenberg, Traurig

Like Sun Bank, Greenberg, Traurig rendered services to both the Plan and to Air Florida itself. Greenberg, Traurig drafted the plan and provided legal services to it from its inception until December 1982; the firm also provided services to Air Florida from the early 1970's until August 1982. Even though Greenberg, Traurig acted as independent outside counsel and performed services primarily on an as-requested basis, the law firm's involvement with the Plan was substantial. For example, at least partly on its own initiative, Greenberg, Traurig prepared several Plan amendments between 1977 and 1980. These amendments related to

calculating and determining employer contributions, discerning types of investments permitted under the Plan, and including an Air Florida subsidiary as a sponsor.

Greenberg, Traurig became involved in the events directly relevant to this litigation when Eli Timoner contacted the firm about the prospective purchase of GALIC-owned Air Florida stock. Caesar Alvarez, the Plan's contact at Greenberg, Traurig, advised the Plan that the transaction would comply with the Plan documents and with applicable ERISA provisions. The firm accordingly provided legal services associated with the loan from Sun Bank and the acquisition of GALIC shares. Incident to formulating its opinion that the transaction was permissible, Greenberg, Traurig needed to determine whether the trustee to the Plan had considered the prudency of the investment as required by ERISA. *See* 29 U.S.C. § 1104(a)(1)(C) (1988). The record leaves unclear the extent to which Greenberg, Traurig itself commented independently on the business or financial prudency of the purchase.

In September 1981, during a period of sharp decline in the value of Air Florida stock, Timoner asked the Plan's securities brokerage about the possibility of disposing of the Plan's holdings in Air Florida. The brokerage advised that although such a sale was possible, public disclosure would be required under the applicable securities laws. In this connection, Greenberg, Traurig told the Plan that this opinion concerning public disclosure of the transaction was correct. Timoner then determined that such a disposition, coupled with

the required public disclosure, would collapse the market value of the shares – an outcome certainly detrimental to the company, and harmful to the Plan as well because the balance of any shares remaining with the Plan would bring significantly lower value.

Through the fall of 1981, the price of Air Florida stock continued to decline, prompting Sun Bank's first demand for additional security. Greenberg, Traurig was consulted in connection with the permissibility, under ERISA, of Air Florida guaranteeing the Plan's loan and advised that the company could not guaranty the Plan's debt in compliance with ERISA, but proposed that such a guaranty would be permissible if the existing profit sharing plan were converted into an ESOP. Accordingly, a resolution was passed to so transform the Plan, and Air Florida guaranteed the loan. The documentation needed to complete the conversion from profit sharing plan to ESOP, however, was never completed. Nevertheless, in transactions after January, Sun Bank and Air Florida repeatedly referred to the plan as an ESOP or stock ownership plan without consulting Greenberg, Traurig.

When Sun Bank called the loan in August 1982, Greenberg, Traurig prepared a response letter and assisted in negotiations with the bank. Attorneys at Greenberg, Traurig, advised that the Plan had no choice but to sign the letter agreement produced by the negotiations. There is evidence suggesting that attorneys at the firm knew or should have known that the redocumentation (involving the reincorporation of the January pledge of corporate assets to secure the loan) offended applicable ERISA principles. An attorney from the firm wrote to Air Florida in December 1982, setting

forth the available options – specifically, the completion of the conversion to an ESOP or a Department of Labor administrative exemption – for avoiding a violation of ERISA in light of the company's guaranty of the loan earlier that year. This letter did not receive a response.

During the fall of 1982 and 1983, Greenberg, Traurig's role in the facts relevant to this appeal gradually diminished. Incoming trustee and corporate officer Lloyd-Jones replaced the firm as Air Florida's counsel with Debevoise & Plimpton in August 1982. He would also replace Greenberg, Traurig as counsel to the Plan in the summer of 1983.

3. Proceedings Below

Appellant filed suit against Sun Bank and others on January 2, 1985, amending the complaint as of right 5 days later. The Plan was granted leave to amend a second time in March 1987, and its Second Amended Complaint named Greenberg, Traurig as a defendant. The district court denied a motion to amend the complaint a third time in July 1987.

In November 1988, the parties to this appeal moved for summary judgment. The hearing on these motions was set for December 15, and took place on December 15 and 16. Although the discovery deadline was October 15 pursuant to the order of the district court, appellant filed an affidavit taken from Donald Lloyd-Jones on December 14 at 4:49 p.m. in support of its memoranda in opposition to the appellees' motions for summary judgment. At the hearing the next day, appellant moved *ore tenus* to amend the Second Amended Complaint to include a count against Sun Bank alleging liability as a

non-fiduciary knowingly participating in a fiduciary breach.

On March 30, 1989, the district court docketed its Order on Motions for Summary Judgment ("March 30 order"), striking the Lloyd-Jones affidavit as untimely, denying appellant's *ore tenus* motion to amend, and granting summary judgment to Sun Bank and Greenberg, Traurig on the issues of fiduciary and non-fiduciary liability. *Useden v. Acker,* 721 F.Supp. 1233 (S.D. Fla. 1989). On appellant's motion, the district court certified the March 30 order for appeal pursuant to Fed.R.Civ.P. 54(b) on May 16. To this, appellees responded that several issues remained unadjudicated by the March 30 order, specifically, appellant's action for violations of Regulation U and the possible application of the statute of limitations. On July 28, 1989, this court dismissed appellant's notice of appeal as premature. Accordingly, on September 8, 1989, the district court issued a Second Order specifically adjudicating the remaining issues, vacating its earlier Rule 54(b) certification, and recertifying the case for appeal. *Useden v. Acker,* 734 F.Supp. 978 (S.D. Fla. 1989). Appellant does not appeal the district court's denial of its own motion for summary judgment.

II. DISCUSSION

1. Jurisdiction

Appellees argue that this court lacks jurisdiction to decide some of the issues pursued in this appeal on grounds related to the fact that the district court issued two different summary judgment orders. In essence, appellees urge us to ignore the issues of substantive

rights raised in this litigation due to an alleged technical filing defect.

Specifically, they note that appellant filed his first notice of appeal from the March 30 order simultaneously with his motion for certification for appeal under Rule 54(b). This notice of appeal, therefore, was filed *prior* to the district court's Rule 54(b) certification of the order on May 16, 1989.[5] Appellant, moreover, failed to correct the mistake by noticing a new appeal within 30 days following the May 16 certification, as required by Fed.R.App.P. 4(a)(1).[6] *See McLaughlin v. City of LaGrange*, 662 F.2d 1385, 1387 (11th Cir.1981) (per curiam), *cert. denied*, 456 U.S. 979, 102 S.Ct. 2249, 72 L.Ed.2d 856 (1982). The filing of a timely notice of appeal under Rule 4(a)(1) is a jurisdictional prerequisite. *Burnam v. Amoco Container Co.*, 738 F.2d 1230, 1231 (11th Cir.1984) (per curiam). Indeed, this court dismissed appellant's first appeal as premature in its July 28, 1989 order:

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[5] Under Rule 54(b), an order which fails to determine the rights and liabilities of all the parties to an action is not an appealable final order unless the district court determines that there is no just reason for delay according to 54(b) standards and directs entry of judgment.

[6] Rule 4(a)(1) provides in pertinent part:

> In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal . . . shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from. . . .

> The district court's March 30, 1989 order was not final and appealable because it did not dispose of all the claims of all the parties to the action. This appeal filed prior to the entry of the district court's Rule 54(b) certification was premature and ineffective. The district court's Rule 54(b) certification did not cure the premature appeal; a new notice of appeal following the certification order is necessary to perfect an appeal from the summary judgment order.

Order of the Eleventh Circuit, No. 5416, July 28, 1989, R54-1401 (citations omitted). As a result, appellees argue, appellant has lost his ability to appeal the rulings encompassed in the March 30 order. Therefore, appellees urge that our review be restricted to the content of the September 8 order of the district court, which admittedly was timely appealed.

Our resolution of this issue requires us to examine the district court's circumvention of Rule 4(a)(1) for an abuse of discretion. In order to permit a timely appeal of all issues notwithstanding the lapse of the 4(a)(1) time limit, the trial court vacated the May 16 Rule 54(b) certification and reentered a new certification on September 8, 1989; this move initiated a fresh 30-day time limit for filing a notice of appeal.[7] For our purposes, the effect of the Second Order of September 8 is best characterized as a relief from final judgment under

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[7] The time for filing notice of appeal was subsequently tolled by Sun Bank's motion for reconsideration under Fed.R.Civ.P. 59(e). Appellant timely noticed appeal on May 11, 1990.

Fed.R.Civ.P. 60(b).[8] Rule 60, though, does not sanction the use of this tactic for the naked purpose of enabling the filing of a timely appeal. *Tucker v. Commonwealth Land Title Ins. Co.*, 800 F.2d 1054, 1056 (11th Cir.1986) (per curiam). Moreover, the clear meaning of Fed.R.Civ.P. 77(d) precludes appellant from relying on mere lack of notice as grounds for Rule 60(b) relief.[9]

This circuit has recognized, however, that Rule 60(b) is an appropriate escape valve when counsel has acted diligently and in reliance upon statements of the trial court. *Harnish v. Manatee County*, 783 F.2d 1535, 1538 (11th Cir.1986). The instant case presents just such a scenario. From a review of the proceedings below, it is evident that counsel for appellant was, to a significant extent, induced by the conduct of the trial court to forego the filing of a new notice of appeal following the May 16 certification order. Most importantly, the district court decided on May 18 to hold a hearing on May 25 concerning the possible nonfinality

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[8] Rule 60(b) provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding. . . .

[9] Fed.R.Civ.P. 77(d) provides in pertinent part:

> Lack of notice of the entry [of a judgment or order] by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure.

of its March 30 summary judgment order. This inquiry into the character of the order was prompted by Sun Bank's Response in Opposition to Plaintiff's Motion for 54(b) Certification, wherein Sun Bank had first asserted that there remained unresolved claims that rendered the 54(b) certification premature. Thus, in close temporal proximity with the entry of the May 16 Rule 54(b) order (docketed May 22), the district court cast doubt on that same order by inviting arguments regarding the nonfinality of the underlying March 30 order.

At the May 25 hearing, the court acknowledged that certain issues were left unresolved by the March 30 order and expressed a firm intention to remedy the procedural posture of the case:

> [T]his is not a final order and there are other issues, and as I contemplated it, I said let's get all the other issues resolved and then I will certify those and the [Circuit] Court can consider the whole thing.
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> * * *
>
> I might as well give them every issue to rule upon as long as they are going to have it.
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> * * *
>
> Let's hear all these issues so we can at least give the Court of Appeal everything to consider.

Transcript of May 25, 1989, R62-1072-3-9. The district court's apparent realization of the nonfinal character of the March 30 order, coupled with the judge's express intention to somehow posture the case for a comprehensive appeal, plausibly indicated an intention to alter or

amend the 54(b) certification.[10] In light of the suspect status of the May 16 certification order, appellant's failure to file a second notice of appeal was understandable, especially considering that this court had not yet ruled on the prematurity of the March 30 Notice of Appeal.

Through the procedural mechanism of vacating the earlier, premature Rule 54(b) certification, "the court avoided the manifest injustice worked by a rigid application of the provisions of Rule 77(d) to the above-recited facts." *Harnish,* 783 F.2d at 1539. We therefore hold that the district court acted within its discretion in vacating its earlier orders on summary judgment and Rule 54(b) certification. Accordingly, we take jurisdiction to decide all the issues adjudicated below and argued by the parties on appeal.

2. The Lloyd-Jones Affidavit

In its March 30 Order on Motions for Summary Judgment, the district court struck the affidavit of Donald Lloyd-Jones, filed literally on the eve of the hearing on motions for summary judgment, as untimely. We will not consider the document in our review of this case unless the district judge abused his

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[10] This intention to alter the certification was clearly within the realm of procedural possibility. Fed.R.Civ.P. 59(e) provides for motions to alter or amend a judgment within 10 days after entry of the judgment; a court may effect a *sua sponte* 59(e) motion within the same time period. *See Burnam,* 738 F.2d at 1232. A Rule 59(e) motion tolls the time for filing the notice of appeal.

discretion in striking the affidavit. *Clinkscales v. Chevron U.S.A., Inc.*, 831 F.2d 1565, 1568 (11th Cir.1987). In *Clinkscales,* this court ruled that the district court judge did not abuse his discretion in refusing to accept an affidavit untimely filed under the local rules. We stated: "Absent an affirmative showing by the non-moving party of excusable neglect according to Fed.R.Civ.P. 6(b), a court does not abuse its discretion in refusing to accept out-of-time affidavits." *Id.* (footnote omitted).[11]

In the instant case, appellant Useden procured the affidavit in issue from a key witness – a former Plan trustee – incident to a last-minute settlement with that witness. Appellant then sought to file the affidavit well after both the deadline imposed by the local rule and the already-enlarged deadline of the district court (October 15, 1988). *See* S.D.Fla. Local Rule 10 C & J (affidavits in opposition to a motion for summary judgment are to be filed along with the memorandum of law, due ten days after service of the motion).

The content of the affidavit was not newly discovered evidence extracted from a previously missing source. The affiant was available to the appellant

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[11] Fed.R.Civ.P. 6(b) provides:

> When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion . . . upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect. . . .

throughout the course of discovery and in fact provided extensive deposition testimony apart from the affidavit. That the affidavit could only be obtained upon a compromise settlement did not earn it an exemption from the district court's discovery cutoff. We decline to hold that the late hour of the settlement deal was by itself sufficient to establish "excusable neglect" under Rule 6(b). The district court, we therefore find, was well within its discretion in striking the untimely affidavit. *See Clinkscales,* 831 F.2d at 1568-69.

3. Fiduciary Status Under ERISA

a. *Standard of Review*

Useden appeals from the district court's order granting summary judgment in favor of Sun Bank and Greenberg, Traurig. On appeal, parties seeking affirmance of summary judgment bear the exacting burden of demonstrating that no genuine dispute exists as to any material fact in the case. *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970); *see also* Fed.R.Civ.P. 56(c). In assessing whether the movants have met this burden, we review the evidence and all factual inferences arising from the evidence in the light most favorable to the non-moving party. *Adickes,* 398 U.S. at 157, 90 S.Ct. at 1608. A district court's order granting summary judgment is subject to *de novo* review by this court, *Thompson v. Metropolitan Multi-List, Inc.,* 934 F.2d 1566, 1570 (11th Cir.1991), and we apply the same legal standards that control the district court in determining whether summary judgment is appropriate. *Buxton v. City of Plant City,* 871 F.2d 1037, 1040 (11th Cir.1989).

Appellees, proposing something of a departure from these standards, urge us to adopt a relaxed standard of review for all cases in which the district court judge, rather than a jury, would be the ultimate trier of fact were the action to proceed to trial. In this case, Judge Ryskamp would be the finder of fact at trial,[12] and he has already considered a comprehensive body of affidavits, depositions and other matters of record. These circumstances may suggest that the judge is in an enhanced position to draw inferences and resolve the action without resorting to the expense of trial. As this court's predecessor has explained:

> If decision is to be reached by the court, and there are no issues of witness credibility, the court may conclude on the basis of the affidavits, depositions, and stipulations before it, that there are no genuine issues of material fact, even though decision may depend on inferences to be drawn from what has been incontrovertibly proved. . . . A trial on the merits would reveal no additional data. . . . The judge, as trier of fact, is in a position to and ought to draw his inferences without resort to the expense of trial.

Nunez v. Superior Oil Co., 572 F.2d 1119, 1123-24 (5th Cir.1978). *Cf. Coats & Clark, Inc. v. Gay*, 755 F.2d 1506, 1509 (11th Cir.), *cert. denied*, 474 U.S. 903, 106 S.Ct. 231, 88 L.Ed.2d 230 (1985) (emphasizing that *Nunez* entreats caution, especially where a jury trial would be

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[12] The ERISA claims in the present case do not entitle plaintiff to a jury trial. *Calamia v. Spivey*, 632 F.2d 1235, 1237 (5th Cir.1980).

pretermitted by summary judgment). Relying on *Nunez*, appellees assert that a "clearly erroneous" standard of review is appropriate in this case. *Cf.* Fed.R.Civ.P. 52.

While "[s]ummary judgment procedure is [not] properly regarded as a disfavored procedural shortcut," *Celotex Corp. v. Catrett,* 477 U.S. 317, 327, 106 S.Ct. 2548, 2555, 91 L.Ed.2d 265 (1986), this circuit's predecessor has acknowledged that it is nonetheless "a 'lethal weapon' capable of 'overkill.'" *Nunez,* 572 F.2d at 1123 (quoting *Brunswick v. Vineberg,* 370 F.2d 605, 612 (5th Cir.1959)). An understanding of these considerations guided this court *Hiram Walker & Sons, Inc. v. Kirk Line,* 877 F.2d 1508 (11th Cir.1989). There, this court addressed and rejected the same argument for applying the clearly erroneous test as that advanced by the present appellees. We concluded it would not be prudent to accord a presumption of correctness to the district court's findings of fact when it had disregarded contradictory evidence and drawn inferences against the non-movant. *Id.* at 1513 n. 4. We decline in this case to depart from *Hiram Walker.*

This position benefits from an accurate assessment of the scope of the *Nunez* holding. *Nunez* addressed whether the *trial judge* should draw inferences from uncontroverted facts at the summary judgment stage. It therefore speaks only to the appropriate stage of trial at which inferences from undisputed facts may be drawn, not the level of deference to be accorded those

inferences on appeal.[13] An ERISA case, *Phillips v. Amoco Oil Co.*, 614 F.Supp. 694 (N.D.Ala. 1985), *aff'd*, 799 F.2d 1464 (11th Cir.1986), *cert. denied*, 481 U.S. 1016, 107 S.Ct. 1893, 95 L.Ed.2d 500 (1987), erroneously relied upon by appellees, is illustrative of this distinction. There, the trial court cited *Nunez* and *Coats* in holding that questions of intent or motive are appropriate for summary judgment if the underlying facts are not disputed and the central question in the case is whether, as a matter of law, the alleged conduct violates ERISA. *Phillips*, 614 F.Supp. at 723 n. 35. On appeal, this court praised the "comprehensive, thorough, and well reasoned" opinion of the district court, but did not opt to subject the lower court's grant of summary judgment to merely a "clearly erroneous" test. *Phillips*, 799 F.2d 1467-68. In this case, as in *Phillips*, 799 F.2d 1467-68. In this case, as in *Phillips*, the wisdom of the *Nunez* opinion informs the conduct of the trial court in drawing its inferences from the evidence, not the standard of review adopted by this court of appeal. We therefore decline as this court did in *Hiram Walker* to

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[13] The *Nunez* opinion illuminates this nuance by setting apart in a footnote the question of standards governing appellate review. *Nunez*, 572 F.2d at 1124 n. 6. The opinion therein cites cases in which courts reviewed issues that had been tried to juries, on the one hand, and to the court, on the other, and notes that the standard of review for each type of trial differs. Only in that footnoted passage does the *Nunez* court deal with the *level of deference* paid to the conclusions of the trial court on appeal. The main portion of the opinion, then, clearly addresses the propriety of granting summary judgment and does not disturb the settled principle that appellate courts review such dispositions *de novo*.

pioneer the application of a relaxed test in reviewing the grant of summary judgment.[14] We examine the conclusions reached below *de novo*.

b. Sun Bank

Appellant's fiduciary claims against Sun Bank turn primarily on the theory that the bank acquired fiduciary status when it exercised its powers under the insecurity provisions of the 1981 loan of $1.6 million. ERISA Section 502(a)(2), 29 U.S.C. § 1132(a)(2) (1988), empowers a plan fiduciary to bring a civil action for

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[14] *Hiram Walker* also involved an appeal from a summary judgment order issued by Judge Ryskamp. There, as here, parties on both sides had moved for summary judgment. The court of appeal noted in that case that Judge Ryskamp may have incorrectly assumed that no facts were in dispute merely because all parties had moved for summary judgment. The record in the present case discloses Judge Ryskamp's acknowledgment that contested issues of fact might yet remain, but also evidences an eagerness to dispense with the case at the summary judgment stage for the same reasons articulated in *Nunez:* "I think that every facet of this case has been fully explored and the court has been considerably enlightened as to the details of this entire transaction. . . . It is also apparent that this court would have to sit as the trier of fact to hear this case, and it is quite different when you hear a summary judgment knowing the case will go to a jury and when a case is going to be tried by the court." Transcript of Decision, December 16, 1988, R59-961-2. While the judge's willingness to draw inferences from the facts was consistent with *Nunez* on appeal our review will be unaffected by any inferential conclusions below.

relief under Section 409 against a breaching fiduciary. Section 409 provides:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate. . . .

29 U.S.C. § 1109(a) (1988). Appellant proceeds under this liability provision in seeking monetary damages against Sun Bank, alleging that the bank's actions against the Plan under the loan terms amounted to an exercise of discretionary authority or control over Plan assets such that it acquired fiduciary status.

ERISA Section 3(21)(A) defines a fiduciary not simply in terms of certain designated offices, but also more flexibly, with reference to the functions performed by a person:

> [A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any monies or other property of such plan, or has any authority or responsibility to do so, or (iii) he

> has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A) (1988).[15] Thus, ERISA contemplates that fiduciary responsibility will be reposed automatically in a party that assumes a discretionary role. Owing to the statute's definitional approach, it is legally possible that a party whose business touches on the disposition of plan assets, even if only a lending bank, could assume fiduciary status with respect to a plan and become liable for fiduciary breaches. Nonetheless, the discretionary role needed to support fiduciary status must amount to more than a theoretical contrivance. As one commentator has recently noted:

> A secretary to a fiduciary may have discretion as to some mundane matters of plan management, but secretaries are not thereby made fiduciaries – not even limited ones. In principle, they could be, but experience and common sense suggests that a minimum level of discretion should be fixed, below which a person has no fiduciary responsibility at all.

Jay Conison, *The Federal Common Law of ERISA Plan Attorneys,* 41 Syracuse L.Rev. 1049, 1073 (1990). The issue with respect to Sun Bank is whether its powers as a secured commercial lender realistically gave rise to the discretionary control of the nature contemplated by ERISA.

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[15] The term "named fiduciary" is collaterally defined in ERISA Section 402(a)(2), 29 U.S.C. § 1102(a)(2) (1988), as a fiduciary named in the plan instrument.

At the outset, we must determine whether the terms of the loan agreement consummated in 1981 conferred fiduciary status on Sun Bank. Because the loan was secured by stock collateral, the loan necessarily conferred on the bank certain rights against the Plan that involved the disposition of Plan assets. For example, the bank was empowered to demand additional collateral. It was also empowered to liquidate the collateral pledged by the Plan and to compel the Plan to produce the S-15 registration (converting restricted shares to freely negotiable shares) that might be needed to effect the liquidation. While these rights indeed created an "authority" over the Plan assets that were pledged on the loan, they were remedies in the form of those commonly reserved to commercial lenders and were limited by a fixed framework – the statutory and common law, the loan's own terms, and the dictates of banking industry custom. The undisputed facts establish that the facially broad insecurity and liquidation provisions were typical of arm's length commercial loan agreements. As under ordinary debtor-creditor agreements, then, these powers were specifically limited.

An entity which assumes discretionary authority or control over plan assets will not be considered a fiduciary if that discretion is sufficiently limited by a pre-existing framework of policies, practices and procedures. *See Munoz v. Prudential Ins. Co.*, 633 F.Supp. 564, 568 (D.Colo. 1986) ("[I]t is a person's ability to make policy decisions outside of a pre-existing or separate framework of policies, practices and procedures

which saddles that person with Erisa fiduciary liability."); *see also Gelardi v. Pertec Computer Corp.*, 761 F.2d 1323, 1325 (9th Cir.1985) (per curiam) (holding that administrative actions within a framework of policies established by others do not constitute the exercise of fiduciary responsibility). Here, clear standards circumscribed Sun Bank's discretion with respect to the Plan. Florida's UCC good faith requirement, for example, limited the power of the bank to deem itself insecure. *See* Fla.Stat. § 671.203 (1990). The liquidation powers of the bank were also limited by clear standards, inasmuch as the promissory note provided that Sun Bank would be entitled to convert the preferred stock into common stock *only in the event* of the Plan's failure to make payments when due. The collateral pledged was deemed unsatisfactory only in accordance with the 70% margin call, which is commonly the objective standard used in commercial loans.[16] In light of this web of legal and contractual standards, we cannot hold that the conversion terms of the 1981 loan agreement conferred fiduciary status on Sun Bank.

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[16] Useden's contention that the 70% margin call was not an initial part of the loan agreement is of no avail. The underlying custom provides some objective, if not absolute, limitation on the bank's powers. Coupled with the bank's ultimate adherence to this objective standard, this custom provides uncontroverted evidence that the bank's powers under the loan agreement were meaningfully limited and not later exceeded. A dispute as to a fact of insufficient probative value will not preclude summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 246-50, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

Having rejected the loan documents as a textual source of fiduciary status, we must further address whether the bank's exercise of its rights and remedies triggered the attachment of fiduciary status. In the interest of consistency, we are reluctant to hold that the *creation* of legal rights in the bank failed to give rise to fiduciary status, but the *exercise* of those rights in conformity with the loan agreement did so nonetheless. In this case, the record shows that Sun Bank repeatedly found itself insecure due to the declining value of Air Florida stock, demanded additional collateral from the Plan, applied cash collateral and liquidated stock to reduce the outstanding balance, accepted a guaranty of the debt by the Plan sponsor and ultimately satisfied the full balance by liquidating collateral after default on the already renewed promissory note. At no point did Sun Bank's extraction of these remedies amount to management of the Plan itself. We cannot agree with appellant's claim the bank's mere exercise of its contractual rights made the bank an alter ego of the named Plan fiduciaries. Although the bank's actions may have prompted the named fiduciaries to take steps detrimental to the Plan, Sun Bank is not equally responsible for this alleged mismanagement of the Plan assets.

To accept appellant's theory would subject any commercial lender acting within ordinary commercial custom to inconsistent obligations. On the one hand, a bank's duty to its own shareholders and depositors would demand that it enter into only those loan agreements which accord it sufficiently exacting security rights. On the other hand, a bank's resulting fiduciary duty to the plan-borrower would irreconcilably preclude

its exercise of those crucial rights. Consistent with the fundamental purposes of ERISA, we decline appellant's invitation to impose a regime subjecting lenders to irreconcilable obligations and in so doing make it difficult or impossible for pension plans to persuade lenders to enter into arm's length, commercial loan transactions.

Our review of the case law ratifies our reluctance to confer fiduciary status on a bank merely because it legally converted plan assets held in its possession or exercised other ordinary powers under a lender-borrower relationship. Relevant cases have even rejected ERISA fiduciary status when the lender acted improperly or outside its legal rights. In *O'Toole v. Arlington Trust Co.*, 681 F.2d 94 (1st Cir.1982), the court held that it lacked jurisdiction over an action against a bank in which pension funds were deposited because the bank was not a fiduciary within the meaning of ERISA. *See id.* at 96. Even though the bank in *O'Toole* had improperly converted assets of the plan by using deposited funds to offset debts of the plan sponsor, the court refused to hold

> that the bank is a fiduciary within the meaning of the statute. . . . [The bank's] responsibilities as the depository for the funds do not include the discretionary, advisory activities described by the statute – activities which in fact were performed by [the trustees]. In the absence of these activities, it would be unfair to impose on [the bank] the responsibilities and liabilities created by the statute for fiduciaries.

Id.

Also instructive is *Robbins v. First American Bank of Virginia*, 514 F.Supp. 1183 (N.D.Ill.1981). There, the district court addressed the ERISA ramifications of a loan participation agreement between the defendant-bank and the trustees of an ERISA plan, whereby the plan offered 90% of the loan proceeds to a certain defendant-borrower. Dismissing an action brought against the bank after the borrower defaulted, the court held:

> The bank was never itself involved with the administration or management of the fund itself or in making its investment policies and decisions. . . . The fixed terms of the loan [to the third party borrower] and commercial nature of the transaction belie the plaintiff's allegations of sufficient discretionary responsibility to come within the terms of the Act.

Id. at 1190-91; *see also Brandt v. Grounds,* 687 F.2d 895, 898 (7th Cir.1982) (holding that a bank is not a fiduciary liable for monies improperly converted by a trustee merely because it performed its depository function in the withdrawal transactions); *American Sav. & Loan Ass'n/Home Sav. Ass'n.* Dep't Labor Op. No. 79-10A, at 3-4, 6 (Feb. 12, 1979) (stating that a savings and loan association's depository relationship with an ERISA plan does not render the association a fiduciary under ERISA); *Hibernia Bank v. International Bhd. of Teamsters,* 411 F.Supp. 478, 488-90 (N.D.Cal.1976) (ruling that a bank cannot obtain fiduciary status by virtue of its agency and depository relationships with an ERISA plan). Neither the appellant nor this court can locate a case in which fiduciary status was conferred on a bank due to its ordinary commercial lending relationship with an ERISA plan.

Accordingly, we agree with the district court in holding that there is no issue as to any material fact in the record to preclude summary judgment as to Sun Bank's fiduciary liability.[17]

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[17] Appellant also asserts that Sun Bank was a fiduciary to the Plan by virtue of its preparation of Federal Reserve Form U-1 incident to the 1981 loan; a lender must complete Form U-1 pursuant to 12 C.F.R. § 221-3(b) (1990). (The form pertains to the valuation of stock collateral under Regulation U, 12 C.F.R. § 221 (1990)). This contention is without legal merit. Appellant relies on *Northern Cal. Retail Clerks Union v. Jumbo Markets, Inc.*, 906 F.2d 1371 (9th Cir. 1990), an irrelevant case holding that an employer must "faithfully and punctiliously" fill out reports on hours worked by employees when such reports are required by the terms of the employee pension plan. *Id.* at 1373. Form U-1 is neither related to the Plan at issue here nor relevant to ERISA. It is prepared for the benefit not of the borrower, but of the Federal Reserve Board. *First Ala. Bancshares, Inc. v. Lowder,* [1981 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 98,015, at 91,252, 1981 WL 1638 (N.D.Ala. May 1, 1981).

Appellant alleges that Sun Bank overvalued the collateral (i.e., restricted stock) reported on the form. Assuming, in appellant's favor, that this error was a breach of some duty owing to the borrower, the ministerial preparation of Form U-1 clearly does not confer fiduciary status needed to bring that breach within the proscription of ERISA. *See* 29 C.F.R. § 2509.75-5 (1991) (persons performing the ministerial duty of preparing reports required by government agencies are not fiduciaries). Regardless, the record is devoid of facts indicating that any erroneous entry on the form – even if Sun Bank's underlying overvaluation of the stock in some way harmed the Plan – can be causally linked to any damages suffered by the Plan. "[A] causal connection is required between the breach of fiduciary duty and the losses incurred by the plan." *Brandt,* 687 F.2d at 898.

c. *Greenberg, Traurig*

Consistent with the functional definition of fiduciary status enshrined in ERISA, our determination concerning the fiduciary status of Greenberg, Traurig demands a functional examination of the law firm's conduct in connection with the Plan. Our inquiry, understood correctly, is not into the law firm's fiduciary duties under general laws applicable to the attorney-client relationship, but instead into fiduciary status within the precise meaning of ERISA. Accordingly, we focus on the firm's discretionary control or management, if any, over the Plan and its assets.

Department of Labor regulations provide elaborate guidance as to when an attorney or other consultant to a plan will be considered a fiduciary:

> [W]hile attorneys, accountants, actuaries and consultants performing their usual professional functions will ordinarily not be considered fiduciaries, if the factual situation in a particular case falls within one of the categories described in clauses (a) through (d) . . . such persons would be considered to be fiduciaries within the meaning of section 3(21) of the Act. [Clauses (a) through (d) provide:] a consultant (a) exercises discretionary authority or discretionary control respecting the management of the plan, (b) exercises authority or control respecting management or disposition of the plan's assets, (c) renders investment advice for a fee, direct or indirect, with respect to the assets of the plan, or has any authority or responsibility to do so, or (d)

> has any discretionary authority or discretionary responsibility in the administration of the plan.]

29 C.F.R. § 2509.75-5 (1991). Applying these regulations, the court in *Yaseta v. Baima*, 837 F.2d 380 (9th Cir.1988), held that an attorney who "reviewed [an ERISA plan] and its compliance with the law" and did not control the plan "in a manner other than by usual professional functions" was not a fiduciary under ERISA. *Id.* at 385. Our review of the facts, likewise, is focused on departures by Greenberg, Traurig from usual professional functions.

The operative facts concern the extent to which Greenberg, Traurig acted outside the usual professional function of attorneys by (1) counseling the Plan as to the business or financial prudency of the June 1981 loan and acquisition of GALIC stock, (2) rendering investment advice with respect to those same transactions, and (3) rendering legal services in connection with the August 1982 redocumentation of the loan and uncompleted conversion of the Plan into an ESOP. In its brief, appellant paints a portrait of a law firm deeply penetrating the governance of the Plan, noting, for example, the firm's drafting of amendments to the Plan on its own initiative, the Plan's heightened reliance on the firm immediately following Timoner's stroke in 1982, the move of one of the firm's attorneys over to the Plan itself during 1982, and the hybrid business-legal character of much of the advice rendered through the relevant timespan. Even adopting all of the factual inferences relied on by appellant to project this portrait, we nevertheless find no basis in law to hold that

Greenberg, Traurig departed from the usual functions of a law firm or otherwise effectively or realistically controlled the Plan.

We think it imprudent and counter to the thrust of the ERISA scheme to hold that the commingling of legal advice with incidental business observations, especially when this advice is proffered to business-persons of some sophistication, will automatically confer fiduciary status on attorneys and thus expose them to ERISA liability. It cannot plausibly be considered consonant with the clear purpose of ERISA to deprive ERISA plans of access to ordinary legal advice, which not infrequently balances legal conclusions with some discussion of attendant business implications. Equally chilling would be a rule equating a law firm's advice in favor of a transaction with the named fiduciaries' actual decision to enter the transaction. Nevertheless, it is exactly this proposition that appellant advances in arguing that Greenberg, Traurig's advice in favor of a given course of action constituted effective control over the actions of the Plan.[18] In short, ERISA

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[18] In accordance with legislative history, we do not reject absolutely the proposition that consultants and advisors can, under some circumstances, assume fiduciary control.

> While the ordinary functions of consultants and advisors to employee benefit plans (other than investment advisers) may not be considered as fiduciary functions, it must be recognized that there will be situations where such consultants and advisers may because of their special expertise, in effect, be exercising discretionary authority

(Continued on following page)

does not contemplate an allocation of liability that will deter consultants such as attorneys from assisting plans. Accordingly, we reject appellant's arguments to the effect that the law firm's attentiveness to

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> or control with respect to the management or administration of such plan or some authority or control regarding its assets.

H.R.Conf. Rep. No. 1280, 93rd Cong., 2d Sess. 32B, *reprinted in* 1974 U.S.C.C.A.N. 4639, 5038, 5103.

Inquiring into the *de facto* control of a stock broker over an ERISA plan, the district court in *Stanton v. Shearson Lehman/American Express, Inc.*, 631 F.Supp. 100 (N.D.Ga.1986) similarly suggested that the dominant expertise of the consultant may be relevant:

> Even though a client may have the final word on how his or her assets will be traded and is, thus, technically in control of the assets, it is the stock broker who is *effectively* and *realistically* in control of the assets when, for whatever reason, the client merely "rubber stamps" – follows automatically or without consideration – the investment recommendations of the broker.

Id. at 103 (emphasis in original). This passage may somewhat overstate the principle sought to be adopted by the district court. It is significant, though, that the *Stanton* court was construing a regulation pertaining to stock brokers; that regulation is formulated so as to readily confer fiduciary status when the broker goes beyond acting on the clear instructions of the plan. *See* 29 C.F.R. § 2510.3-21(d) (1991). Any preference for such purely ministerial conduct would be misplaced in regard to the judgment-intensive services of legal counsel.

business prudency or its occasional rendering of advice touching on an investment conferred fiduciary status on the law firm.[19]

Relevant cases support our reading of ERISA and the applicable regulations. The court in *Nieto v. Ecker,* 845 F.2d 868 (9th Cir.1988), held that an attorney who failed to collect delinquent employer contributions was not a fiduciary. *Id.* at 870-71. The Ninth Circuit persuasively articulated the fallacy of equating the performance of legal services with the exercise of fiduciary authority:

> Plaintiffs contend . . . that [the defendant-attorney] exercised such authority because the employer contributions he failed to collect were plan assets under his discretionary control. . . . This argument proves far too much. Under this rationale anyone performing services for an ERISA plan – be it an attorney, an accountant, a security guard or a janitor – would be rendered a fiduciary insofar as he exercised some control over trust assets. . . .

Id. at 870. *See also, Yaseta,* 837 F.2d at 385; *Anoka Orthopaedic Associates, P.A. v. Mutschler,* 709 F.Supp. 1475, 1483 (D.Minn.1989) ("Applying [Department of Labor regulations pertaining to investment advice to the attorney's] activities, even if the Court assumes that he gave the investment advice . . . , such rendering

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[19] Investment advice must be rendered by one having "discretionary authority or control . . . with respect to purchasing or selling securities" or be rendered on a "regular basis" in order to give rise to fiduciary status. 29 C.F.R. § 2510.3-21(c)(1)(1991).

of advice would not cause him to become a fiduciary. [The attorney] neither had 'discretionary authority or control with respect to purchasing or selling securities' for the Plans, nor did he render advice 'on a regular basis.'" (citations omitted)), *aff'd*, 910 F.2d 514 (8th Cir.1990).

Finding that the undisputed facts support summary judgment on the issue of Greenberg, Traurig's fiduciary status, we affirm the grant of summary judgment below.

4. Non-Fiduciary Liability Under ERISA

As an alternative to fiduciary liability, appellant argues that Sun Bank and Greenberg, Traurig are liable as non-fiduciaries who knowingly participated in a breach committed by an ERISA fiduciary.[20] This theory derives its framework from cases imposing liability where a non-fiduciary party commits an act or omission furthering or completing the breach of a fiduciary, and has actual or constructive knowledge that the act or omission constitutes a breach of trust.

The district court opinion in *Freund v. Marshall & Ilsley Bank*, 485 F.Supp. 629 (W.D.Wis.1979), was a progenitor of cases recognizing a cause of action against

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[20] Appellee [sic] omitted to include such a claim against Sun Bank in its complaint. On appeal, it asserts that the district court should have a permitted an amendment to include such a claim, and advances the legal theory against both appellees in its brief. For purposes of this discussion, we assume that the theory is properly argued against both Greenberg, Traurig and Sun Bank.

non-fiduciaries who conspire with an ERISA fiduciary. *See id.* at 641-42 ("[A court] is fully empowered to award the relief available in traditional trust law against non-fiduciaries who knowingly participate . . . in a breach of trust."); *accord Thornton v. Evans,* 692 F.2d 1064, 1078 (7th Cir.1982). From the premise that Congress intended ERISA to federalize the common law of trusts with respect to employee benefit plans, the *Freund* court proceeded to extend the reach of ERISA to third parties who, under traditional trust law, could be held liable for assisting a trustee in a breach of trust. *Freund,* 485 F.Supp. at 642. Cases since have made reference to specific textual provisions of ERISA, asserting either that the equivalent of fiduciary liability (established in section 409(a)) reaches non-fiduciaries due to the incorporation of trust law into ERISA, *see, e.g., Fremont v. McGraw-Edison Co.,* 606 F.2d 752, 758-59 (7th Cir.1979) (discussing liability of third parties pursuant to a § 409 claim), *cert. denied,* 445 U.S. 951, 100 S.Ct. 1599, 63 L.Ed.2d 786 (1980), or that section 502(a)(3)'s reference to "appropriate equitable relief" encompasses the award of monetary damages against non-fiduciaries. *See, e.g., Lowen v. Tower Asset Management, Inc.,* 829 F.2d 1209, 1220 (2d Cir. 1987) (recognizing basis for recovery against non-fiduciaries under both trust law and § 502(a)(3)'s remedial provisions).

Since *Freund* and many of the opinions relying on its holding were decided, the Supreme Court has unambiguously intervened to restrain the grafting of novel remedies onto the statute. The Court's decision in *Massachusetts Mutual Life Insurance Co. v. Russell,* 473

U.S. 134, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985), collided with the reasoning of these cases by instructing that " 'where a statute [such as ERISA] expressly provides a particular remedy or remedies, a court must be chary of reading others into it.' " *Id.* at 147, 105 S.Ct. at 3093 (quoting *Transamerica Mortgage Advisors, Inc. v. Lewis,* 444 U.S. 11, 19, 100 S.Ct. 242, 246-47, 62 L.Ed.2d 146 (1979)). Since *Russell,* the only circuit court decision to devote due attention to the Court's reasoning in that case has been *Nieto v. Ecker,* 845 F.2d 868 (9th Cir.1988), in which the Ninth Circuit rejected pre-*Russell* theories of non-fiduciary liability by holding that a non-fiduciary plan attorney could not be held liable for a fiduciary breach. *See id.* at 872-73. As a result of the circuits' selective attention to *Russell,* a split in authorities has arisen. *Compare Nieto,* 845 F.2d at 872-73 (rejecting non-fiduciary liability) *with Pappas v. Buck Consultants, Inc.,* 923 F.2d 531, 541 (7th Cir.1991) (accepting non-fiduciary liability) *and Brock v. Hendershott,* 840 F.2d 339, 342 (6th Cir.1988) (same) *and Lowen,* 829 F.2d at 1220 (same) *and Fink v. National Sav. and Trust Co.,* 772 F.2d 951, 958 (D.C.Cir.1985) (citing *Freund* in dicta for non-fiduciary liability principle). Carefully considering the rationales in these and other cases, we conclude that no cause of action exists under ERISA section 409(a) or 502(a)(3) for monetary damages against a non-fiduciary.

At the threshold of our inquiry, it is appropriate to search ERISA's text for any language plainly extending liability to non-fiduciaries. ERISA's monetary damages provision, section 409(a), by its own terms pertains only to fiduciaries. "The plain language of section 409(a)

limits its coverage to fiduciaries, and nothing in the statute provides any support for holding others liable under that section." *Nieto,* 845 F.2d at 871. *See also,* Kevin B. Bogucki et al., Comment, Nieto v. Ecker: *The Propriety of Non-Fiduciary Liability Under Section 409,* 64 Notre Dame L.Rev. 271, 281 (1989). The question whether monetary damages are subsumed under the section 502(a)(3) concept of "equitable relief" is also plainly answered by the text of the statute, when considered as a coherent whole. We agree with the *Nieto* court's reminder that "[p]ermitting recovery of damages under section 502(a)(3) would render section 409(a) superfluous, a result contrary to a fundamental canon of statutory construction." *Nieto,* 845 F.2d at 873. Accordingly, we, like the Ninth Circuit, decline to so broadly interpret an isolated section of the statute as to render it inconsistent with the ERISA scheme as a whole.

Our accord with the holding in *Nieto* does not indicate a wholesale adoption of that decision's rationale. The most important reason for our departure from *Nieto* is that we now decide this question with the benefit of the Supreme Court's opinion in *Firestone Tire and Rubber Co. v. Bruch,* 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989), in which Justice O'Connor explicitly authorized the development of a federal common law under ERISA drawing upon the traditional law of trusts. Citing the trust law principle whereby courts construe trust agreements without deference to the interpretation of either party, the Court held in *Firestone* that the fiduciary's termination of benefits to a participant was subject to *de novo* review. Laying the

groundwork for the incorporation of this procedural rule into ERISA, the Court explained:

> ERISA abounds with the language and terminology of trust law. ERISA's legislative history confirms that the Act's fiduciary responsibility provisions "codif[y] and mak[e] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts." Given this language and history, we have held that courts are to develop a "federal common law of rights and obligations under ERISA-regulated plans."

Id. at 110, 109 S.Ct. at 954 (quoting H.R.Rep. No. 533, 93rd Cong., 2d Sess. 11, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4649; *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 56, 107 S.Ct. 1549, 1558, 95 L.Ed.2d 39 (1987)) (other citations omitted).

The *Nieto* court proceeded without the benefit of the *Firestone* opinion and its invitation to the incorporation of procedural trust law principles; not surprisingly, then, *Nieto* emphasized the restrictive strains of the earlier Supreme Court opinion in *Russell.* In *Russell,* the Court addressed an action by a beneficiary for extracontractual damages who alleged that she had been damaged by a wrongful termination of payments, even after retroactive benefits were paid to her in full. Finding no express authority in the text of ERISA section 409 for extracontractual damages, as well as no indication of Congressional intent supporting an implied right of action for such relief, the Court was

> reluctant to tamper with an enforcement scheme crafted with such evident care as the

> one in ERISA. . . . "The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement."

Russell, 473 U.S. at 147, 105 S.Ct. at 3093 (quoting *Northwest Airlines, Inc. v. Transport Workers,* 451 U.S. 77, 97, 101 S.Ct. 1571, 1583, 67 L.Ed.2d 750 (1981)). The *Nieto* court acknowledged the legislative history supporting the application of certain trust law principles to fiduciaries as defined by ERISA, but, evidently emboldened by the teachings of *Russell,* declared that legislative history "does not support the broad[ ] proposition that ERISA meant to adopt the entire body of state trust law lock, stock, and barrel." *Nieto,* 845 F.2d at 872 n. 2. While we agree with the *Nieto* court's interpretation of ERISA's text, we strive in our analysis to better elaborate the lessons of both *Russell* and *Firestone.*

Accordingly, we interpret ERISA to embody a tailored law of trusts – a legal fabric which not only adopts familiar trust principles, but also supplements these principles with more exacting standards, *and* exempts from its reach certain parties and activities that may have been amenable to suit under traditional trust law. *See Eaves v. Penn,* 587 F.2d 453, 457 (10th Cir.1978). Thus, while it is obvious that ERISA is informed by trust law, the statute is, in its contours, meaningfully distinct from the body of the common law of trusts. A method of interpretation consonant with this realization will reject the unselective incorporation of trust

law rules into ERISA. Rather, a court should only incorporate a given trust law principle if the statute's text negates an inference that the principle was omitted deliberately from the statute. ERISA is a "comprehensive and reticulated statute." *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361, 100 S.Ct. 1723, 1726, 64 L.Ed.2d 354 (1980), bearing the marks of circumspect drafters; courts should proceed with commensurate circumspection before concluding that a prominent feature of trust law was omitted from the statute merely through inadvertence. As the Court taught in *City of Milwaukee v. Illinois*, 451 U.S. 304, 101 S.Ct. 1784, 68 L.Ed.2d 114 (1981):

> The establishment of . . . a self-consciously comprehensive program by Congress . . . strongly suggests that there is no room for courts to attempt to improve on that program with federal common law.

Id. at 319, 101 S.Ct. at 1793.

A recent Second Circuit case, *Chemung Canal Trust Co. v. Sovran Bank/Maryland*, 939 F.2d 12 (2d Cir.1991), *petition for cert. filed*, 60 U.S.L.W. 3411 (U.S. Oct. 22, 1991) (No. 91-681), illustrates this approach in operation. There, the court *recognized* an unenumerated cause of action under ERISA for contribution or indemnity by a breaching fiduciary against a co-fiduciary. Notably, it did not automatically incorporate the indemnity rights recognized in the common law of trusts. Instead, its rationale focused specifically on what was contemplated by the statute's drafters:

> Congress's failure to include enforcement provisions to address the relationships among

> fiduciaries does not necessarily mean that congress intended to preclude such remedies. ERISA was designed specifically to provide redress for plaintiffs – the plan's participants and beneficiaries. Its remedies do not purport to deal with allocating joint liabilities among fiduciaries. . . .

Id. at 18 (citation omitted).

In the present case, appellant would have us ignore the obvious care with which ERISA's remedial provisions are formulated, instead requiring us to supplement the statute with a substantive right against a party that Congress readily could have chosen to reach. Congress clearly contemplated the involvement of non-fiduciary parties with employee benefit plans when it drafted provisions of ERISA. For example, ERISA sections 502(a)(3) and 502(a)(5) authorize suits to enjoin or obtain other equitable relief for *"any act or practice"* violating either the statute or the terms of a plan, without restricting the types of parties who may be so sued. 29 U.S.C. §§ 1132(a)(3), 1132(a)(5) (1988). ERISA section 3(14)(B), moreover, broadly defines the "parties in interest" with whom plans are prohibited to enter into certain transactions under section 406(a). 29 U.S.C. §§ 1002(14)(B), 1106(a) (1988). Significantly, however, Congress expressly limited the scope of sections 502(a)(3) and 502(a)(5) to equitable remedies, and likewise limited section 409(a) to provide a right of action only against fiduciaries. It is telling that, despite textual treatment of non-fiduciaries in various other parts of the ERISA scheme, provisions relevant to appellant's theory contain no textual support for a

claim for monetary damages against nonfiduciaries. We cannot infer that Congress's silence is accidental in an area where Congress has already said so much out loud.

We recognize that federal courts may be authorized in certain areas to borrow procedural devices and principles from trust law. Nonetheless, we must conclude that, just as "[t]he six carefully integrated civil enforcement provisions found in § 502(a) of the statute . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly," *Russell*, 473 U.S. at 146, 105 S.Ct. at 3092 (emphasis in original), neither do relevant provisions imply a cause of action for monetary damages against a party excluded by – but clearly within the contemplation of – Congress at the time it formulated the ERISA scheme.

The district court correctly concluded that there is no cause of action for monetary damages under ERISA sections 409(a) or 502(a) for the participation of a nonfiduciary in a fiduciary breach. Therefore, its grant of summary judgment for Sun Bank and Greenberg, Traurig was appropriate.

5. Regulation U

Appellant also asserts a private cause of action implied under Regulation U, 12 C.F.R. § 221 (1990). Regulation U, promulgated under section 7 of the Securities Exchange Act of 1934, 15 U.S.C. § 78g (1988), imposes credit restrictions on banks that issue loans secured by certain stock. In short, appellant alleges that Sun Bank violated Regulation U's "margin rules"

by its method of valuing the stock pledged as collateral on the June 1981 loan.

On this theory, appellant clearly fails. *Cort v. Ash,* 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), sets forth an analysis for determining the existence of an implied right of action under a federal statute. The *Cort* factors ask, *inter alia,* whether the plaintiff is a member of the class for whose benefit the statute was enacted, and whether there is any indication of congressional intent to provide the remedy sought. *Id.* at 78, 95 S.Ct. at 2088. Regulation U is clearly not targeted to serve the especial benefit of borrowers, as lenders and borrowers are equally culpable under the applicable regulations; significantly, Regulation X makes it a violation on the part of the *borrower* to accept credit in violation of the margin rules. *See* 12 C.F.R. § 224 (1990) (promulgated under 15 U.S.C. § 78g(f)).[21] This reciprocity of culpability also negates the *Cort* factor that looks to possible congressional intent to create the remedy sought by a private party. The clear intention is that both lender and borrower should simply conform their conduct to the margin rules, not sue one another for violations. In sum, there is no indication that Congress intended to create a private cause of action under Regulation U. *See generally Bennett v. U.S. Trust Co.,* 770 F.2d 308, 313 (2d Cir.1985), ("[W]e agree with the unanimous view of the circuit courts [which] hold that there

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[21] Appellant's reliance on Congress's especial concern for employee retirement plans under ERISA, in connection with an implied cause under Regulation U, is simply mysterious.

is no implied cause of action for violations of [Regulation U]"), *cert. denied,* 474 U.S. 1058, 106 S.Ct. 800, 88 L.Ed.2d 776 (1986).

As the Regulation U theory fails legally, summary judgment for the appellees as to appellant's Regulation U-based cause of action is appropriate.

6. Remaining Issues

Appellant argues on appeal that the district court abused its discretion in denying its *ore tenus* motion to amend its complaint to include a cause of action against Sun Bank as a non-fiduciary knowingly participating in a fiduciary breach. Because we have rejected this theory of liability, we need not address any abuse of discretion committed by the court in denying appellant's motion to add this claim to its complaint.

We also find it unnecessary to reach the issue of the availability to the Plan of extracontractual and punitive damages under ERISA section 409, 29 U.S.C. § 1109(a) (1988). Noting that the Supreme Court expressly left open the issue in *Russell,* 473 U.S. at 144 n. 12, 105 S.Ct. at 3091 n. 12, we defer consideration of this issue to a day when a plaintiff proceeding under section 409 has successfully asserted a theory of liability.

III. CONCLUSION

Based on the foregoing, we hereby AFFIRM the order of the district court granting summary judgment in favor of defendants Sun Bank and Greenberg, Traurig.

Neil A. USEDEN,
Plaintiff,
v.
C. Edward ACKER, et. al.
Defendants,
No. 85-0002-Civ.

United States District Court,
S.D. Florida.

March 29, 1989.

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

RYSKAMP, District Judge.

This cause was before the court on defendants, Sun Bank of Miami, N.A.'s, Sun Bank, Inc.'s (collectively "Sun Bank") Greenberg, Traurig, Askew, Hoffman, Lipoff, Rosen & Quentel's ("Greenberg, Traurig") motions for final summary judgment, Eli Timoner's ("Timoner") and Cesar Alvarez's ("Alvarez") motions for partial summary judgment, and Sanders Campbell's ("Campbell") motion for final summary judgment. In addition, plaintiff, Neil A. Useden, As Trustee for the Air Florida System, Inc. Profit Sharing Plan and Trust's ("Useden") partial motion for summary judgment against the above defendants, Oliver Kimberly and Donald Lloyd-Jones was before this Court.

For the reasons set forth below, this Court determines that defendants, Sun Bank's and Greenberg, Traurig's motions for final summary judgment are

granted. In addition, Alvarez's motion for partial summary judgment with respect to the issue of punitive damages is granted. The Court reserves ruling on the motions for partial summary judgment on the issue of the statute of limitations.[1] Plaintiff's motion for partial summary judgment and defendant, Campbell's motion for final summary judgment are denied. Finally, plaintiff's supplement to rule 10J statement of material and disputed facts and the affidavit of Donald Lloyd-Jones, served on Greenberg, Traurig on December 14, 1988 are hereby stricken from the record and plaintiff's motion for continuance or extension of time for filing affidavits and *ore tenus* motion to amend the complaint as to Sun Bank are hereby denied.

UNDISPUTED FACTS

1. The Air Florida System, Inc. Profit Sharing Plan and Trust ("Plan") was established by Air Florida Systems, Inc. and Air Florida, Inc. (collectively "Air Florida") on September 12, 1977.[2] The Plan was amended five times, with the last amendment effective on August 1, 1980.

2. Greenberg, Traurig, was at all times material, and is, a law firm practicing in Dade County, Florida. Greenberg, Traurig provided legal services to the Plan

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[1] Defendants Eli Timoner and Greenberg, Traurig, moved for summary judgment on the issue of the statute of limitations. Alvarez adopted Timoner's motion.

[2] The Plan was made retroactively effective to August 1, 1976.

from its inception until December, 1982 and to Air Florida from the early 1970's until August, 1982.

3. Greenberg, Traurig drafted the Plan, which was patterned after a similar profit sharing plan instituted by Southwest Airlines. The characteristic feature of the Plan was that it was an eligible individual account plan, as defined by ERISA, and it was to invest exclusively in employer securities – that is stock of Air Florida or its affiliates. The employer securities acquired by the Plan were to be held by the Plan for extended periods of time and distributed to Plan participants entitled to receive benefits pursuant to the terms of the Plan.

4. Timoner was the named trustee of the Plan from its inception through July 10, 1982, when Timoner suffered a debilitating stroke, at which time Donald Lloyd-Jones ("Lloyd-Jones") assumed Timoner's responsibilities with regard to the Plan. Under the terms of the Plan, the Trustee of the Plan was authorized to borrow or raise money for the purposes of the Plan and was authorized to pledge all or any part of Plan assets to secure the repayment of such a borrowing.

5. Timoner was also the Chief Executive Officer and Chairman of the Board of Air Florida from July 1971 through July 1977 and President and Chief Operating Officer of Air Florida from August 1977 through September 1981. From August 1977 to September 1981, C. Edward Acker ("Acker") was the Chief Executive Officer and Chairman of the Board of Air Florida. Acker left Air Florida in September 1981, at which time Timoner reassumed the positions of Chief Executive Officer

and Chairman of the Board of Directors. In June 1982, Lloyd-Jones joined Air Florida and was appointed Chief Executive Officer and President. After Timoner's stroke, Lloyd-Jones assumed Timoner's corporate duties.

6. In November 1977, Neil A. Useden Associates, Inc. ("Useden Associates") entered into a Plan Service Agreement with Air Florida, where Useden Associates agreed to render certain services to the Plan. On May 8, 1984, plaintiff was appointed Trustee of the Plan. On January 2, 1985, plaintiff instituted this action. Greenberg, Traurig, Sanders Campbell and Oliver Kimberly were not named as defendants until September 1986.

7. Sun Bank of Miami, N.A. is, and at all times material was, a national banking association performing banking functions in Dade County, Florida.

8. Sun Bank, Inc. is located in Orlando, Florida and is a bank holding company which owns all of the outstanding shares of stock of Sun Bank of Miami, N.A. Sun Bank, Inc. has a separate board of directors and separate officers from Sun Bank of Miami, N.A. and did not make the loan that is the subject of this litigation.

9. Sun Bank was one of several banks that provided commercial banking services to Air Florida between 1977 and 1984. Beginning in early 1980, Sun Bank developed a commercial lending relationship with Air Florida and made several loans to Air Florida to enable it to purchase aircraft.

10. Edmund C. Timberlake ("Timberlake") was the commercial banking officer at Sun Bank who maintained contact with Air Florida with regard to its outstanding commercial loans and its commercial banking relationship. Pursuant to his role as commercial lending officer for the Air Florida account Timberlake continuously monitored Air Florida's financial status.

11. On November 11, 1977, Air Florida contributed 50,000 shares of Air Florida common stock to the Plan. On December 30, 1979, the Plan purchased 22,400 shares of Air Florida Series A Preferred Stock. At all times material, the Air Florida common stock did not pay either a cash or stock dividend. The series A Preferred Stock, convertible into 2½ shares of common stock, paid a $.90 annual dividend per share. In addition, the preferred stock carried a "cheap stock" privilege, meaning that a preferred stock owner could purchase ⅛ of a share of common stock in exchange for $.50 of the $.90 dividend. Thus, subsequent to the December 31, 1979 purchase of Series A Preferred Stock, the Plan acquired 2,800 additional shares of Air Florida common stock through conversion of the Series A Preferred Stock dividends. As of May 1981, the Plan also had approximately $700,000.00 in cash as a result of cash contributions from Air Florida.

12. In late 1980 to early 1981, Great American Life Insurance Company ("GALIC") began to dispose of its substantial holdings of Air Florida stock. A significant number of shares were sold by GALIC to Solomon Brothers at a discount from the market price, and later resold by Solomon Brothers in the market. By late May

1981, GALIC's holdings were less than 10% of the outstanding shares of Air Florida stock.

13. In early 1981, Acker and Timoner became aware of GALIC's desire to dispose of certain Air Florida shares of preferred stock and convinced GALIC to sell those shares of stock to the Plan at the same discounted price of the sale of shares to Solomon Brothers.

14. Thus, the Plan purchased 76,000 shares of Series A Preferred stock from GALIC, which was the equivalent of 190,000 shares of common stock. The purchase price for the 76,000 shares of preferred stock was calculated based on the common share equivalent of 100,000 shares at $8.795 per share and 90,000 shares at $12.70 per share for a total purchase price of $2,022,500, averaging $10.65 per share.[3]

15. The purchase of the stock by the Plan occurred shortly after a public offering of Air Florida common stock in May 1981. In this public offering, Air Florida initially offered 2,000,000 shares. The offering was increased to 3,000,000 shares as a result of market demand. The offering sold at $13.50 per share. Moreover, additional stock owned by GALIC was sold in a public offering pursuant to demand registration rights owned by GALIC. In this offering, GALIC sold 1,900,000 shares. Thus, in the early part of 1981,

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[3] Pursuant to Article V. Section 5.1 of the Plan, Plan participants entitled to receive benefits could be issued common stock free and clear of any restrictions. SEC Release No. 33-6188.

4,900,000 shares of Air Florida common stock were sold to the public.

16. The Plan paid for 76,000 shares of Series A Preferred Stock with existing cash and with the proceeds of a nine-month, short-term loan from Sun Bank in the amount of $1.6 million (the "Loan"). The Loan was originally secured by the 76,000 shares of preferred stock purchased, and 40,000 shares of Air Florida common stock owned by the Plan.

17. At the time the decision to purchase the stock was made, senior management of Air Florida, including Timoner, anticipated making a substantial cash contribution to the Plan in the first quarter of 1982 for the fiscal year ending December 31, 1981. The anticipated contribution, based upon Air Florida's expected year end profits, would have been more than sufficient to satisfy the Plan's indebtedness to Sun Bank.

18. Sun Bank's evaluation of the Plan's ability to repay the Loan (and Air Florida's ability to make the year-end contribution to the Plan) was based upon financial information contained in reports filed with the Securities and Exchange Commission; Sun Bank's financial analysis of the past and projected growth of Air Florida; other banks' assessments of Air Florida; Timberlake's own analysis based upon his ongoing relationship with Air Florida as a commercial lender; and the market value of Air Florida stock. Upon the evaluation of these factors Sun Bank determined that it was likely that the Plan would receive a substantial contribution from Air Florida thereby permitting it to satisfy the loan obligation.

19. Prior to making the Loan, Sun Bank specifically evaluated particular aspects of this Loan. Accordingly, in a memorandum from Timberlake to the Credit File dated May 11, 1981, Timberlake outlined four areas of concern to be resolved by Sun Bank before the Loan could be made to the Plan. The four areas of concern were: (i) the applicability of Regulation U of the Federal Reserve Board to the Loan; (ii) the effect of Rule 144 of the Securities and Exchange Commission on the ability to sell the stock collateral; (iii) the legality of the Loan under ERISA; and (iv) the effect of S-16 demand registration rights on the ability to sell the stock collateral.

20. In a memorandum from Timberlake to the Finance Committee dated May 20, 1981, Timberlake demonstrated that each issue identified in the May 11, 1981 memo had been addressed and resolved. Thus, Timberlake (i) ascertained that the Loan to the plan would be subject to Regulation U, and accordingly, Sun Bank could Loan the Plan up to 50% of the value of the collateral pledged by the Plan to secure the Loan; (ii) acknowledged that, absent registration, the shares of stock pledged by the Plan to secure the Loan would be subject to a two-year holding period mandated by Rule 144; (iii) was advised that ERISA did not prohibit the Loan and that Sun Bank would receive a legal opinion from the law firm of Greenberg, Traurig that the borrowing did not violate ERISA, but concluded that under ERISA, in consideration of earlier conversations with officials of the Plan, Sun Bank would not be able to become Trustee for the Plan as long as the Loan remained outstanding; and (iv) was assured that Air

Florida, the Plan sponsor, would provide S-16 demand registration rights to Sun Bank so that the stock collateral could be registered in approximately three days enabling Sun Bank to exercise its rights with regard to the stock collateral.

21. On June 26, 1981 the Loan from Sun Bank to the Plan closed. The documents exchanged during the loan closing included: (i) a promissory note dated June 26, 1981 by and between the Plan and Sun Bank (the "Promissory Note"); (ii) an opinion letter from Greenberg, Traurig to Sun Bank opining, *inter alia*, that Timoner as the Plan Trustee had the power and authority to borrow funds on behalf of the Plan and that the Loan would not violate the Plan or ERISA; (iii) a Federal Reserve Form U-1 executed by Timoner and Timberlake; and (iv) a letter from Air Florida to Sun Bank indicating Air Florida's agreement to provide an S-16 registration statement should it become necessary for Sun Bank to sell the stock in the event of default. After the Loan closed, Sun Bank took possession of the stock collateral (76,000 shares of Series A preferred and 40,000 shares of common) along with stock powers endorsed in blank.

22. The Promissory Note called for three quarterly interest payments with interest payable at the prime rate. The principal balance was due on March 31, 1982. In addition, the Promissory Note contained, *inter alia,* an "insecurity clause," a clause permitting Sun Bank to require additional collateral, and a typewritten provision involving conversion of the preferred shares to common in the event of a monetary default. In addition, the Plan and Sun Bank agreed that if the value of

the collateral pledged to secure the Loan fell below 130% of the outstanding Loan balance, additional collateral would be furnished to Sun Bank to adequately secure the Loan.[4]

23. In placing a value on the stock pledged to secure the Loan for Regulation U purposes, Timberlake multiplied the number of shares of Series A preferred stock pledged to secure the Loan (76,000) by their common share equivalent of 2.5 and added that number (190,000) to the 40,000 shares of common stock pledged, to arrive at 230,000 equivalent shares of common stock. Timberlake then multiplied the 230,000 common shares by $16.00 per share – the traded market value of Air Florida System, Inc. stock on June 26, 1981. Thus, the value of the collateral on the date of the Loan was determined to be $3.68 million.

24. Prior to the purchase of the stock from GALIC, Cesar Alvarez, a partner at Greenberg, Traurig in the Corporate Securities Department, and the contact between Greenberg, Traurig, Air Florida and the Plan, was contacted by Timoner and was advised that the Plan had an opportunity to buy stock from GALIC at a significant discount. Greenberg, Traurig was asked if the purchase could be made. After researching the matter, Alvarez advised Timoner that the purchase of the shares and the borrowing of funds would not be in violation of the Plan documents or ERISA.

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[4] Such a loan to value relationship is commonly known as a 70% margin call.

25. Greenberg, Traurig, as counsel for the Plan provided legal services in connection with the acquisition of the shares from GALIC and the borrowing from Sun Bank.

26. In late August of 1981, Acker resigned his position at Air Florida and joined Pan American World Airways ("Pan Am") as Chief Executive Officer. Pan Am thereafter aggressively competed with Air Florida for passengers on the New York to Miami Route. In the fall of 1981, Acker disposed of his substantial holdings in Air Florida. Acker's resignation was considered to be a serious setback for the continued high profitability of Air Florida.

27. On August 3, 1981, a strike by the Professional Air Traffic Controllers ("PATCO") caused severe reductions in the operating levels of all U.S. based airlines. The reduction in operating levels negatively influenced operating revenues and profits of each airline, including Air Florida.

28. During the late summer and early fall of 1981 Pan Am began a fare war on the New York to Miami route, a key route for Air Florida, thereby creating a serious loss in revenues for Air Florida.

29. On September 1, 1981 Alvarez resigned from Greenberg, Traurig and joined Air Florida as a full-time employee. After September 1st, upon becoming a full-time employee at Air Florida, Alvarez was named Senior Vice-President, and no longer had any affiliation with the law firm.

30. In September 1981, Timoner as Trustee, inquired of Shearson, Lehman as to whether or not the Plan could dispose of its holdings in Air Florida. Shearson, Lehman advised that the Plan could, but a public disclosure would have to be made. Timoner consulted with Alvarez and Greenberg, Traurig, and was advised that Shearson, Lehman's advice concerning public disclosure of such a disposition as required by the securities laws was correct.

31. During the period August 30, 1981 through January 30, 1982, the price per share of the Air Florida common stock fell from $13⅛ to $6⅜.

32. On January 13, 1982, an Air Florida aircraft crashed on takeoff after leaving National Airport in Washington, D.C. This event caused a further depression in the revenues of Air Florida. The crash together with the other negative influences on Air Florida's revenues and profits caused Sun Bank to review the status of the Loan to the Plan.

33. By January, 1982 the value of the stock pledged to Sun Bank as collateral for the Loan fell below the amount necessary to retain the agreed upon margin requirements. Sun Bank communicated its concerns over the value of the collateral to the Plan. At this time, Greenberg, Traurig was contacted by Air Florida on behalf of the Plan, and was advised that because of a decline in the price of Air Florida stock in the market, Sun Bank was requesting additional collateral. Greenberg, Traurig was asked if Air Florida could guaranty the loan to the Plan. The advice given by Greenberg,

Traurig to Air Florida and the Plan was that Air Florida could not give a guaranty for a profit sharing plan, however, if the Plan was converted to an Employee Stock Ownership Plan ("ESOP"), then it could give such a guaranty.

34. On January 22, 1982, by resolution, and unbeknownst to Greenberg, Traurig, the Executive Committee of the Board of Directors of Air Florida authorized Air Florida to take the necessary steps to convert the Plan into an ESOP and to guaranty up to $1.6 million of the Loan to the Plan.

35. On January 28, 1982, Air Florida, Inc. guaranteed the Loan. The Guaranty was signed by Eli Timoner, President of Air Florida. On February 3, 1982, Air Florida, Inc. guaranteed the Loan a second time. The February 3, 1982 guaranty was signed by Cesar L. Alvarez, Senior Vice President of Air Florida.

36. During the first few days of February, 1982, Florentino Gonzalez, Senior Vice President – Finance and Senior Financial Officer of Air Florida ("Gonzalez"), informed Timberlake that the Plan had been converted to an ESOP. Accordingly, Timberlake began referring to the Plan as an ESOP.

37. As a result of the decrease in the value of the collateral pledged to secure the Loan, at various times during the first six months of 1982, cash collateral (in the form of repurchase agreements) was pledged to provide additional security for the Loan. Moreover, additional Air Florida stock owned by the Plan and Western Airlines stock owned by Air Florida was pledged to secure the Loan. At the time, Greenberg,

Traurig was unaware of the pledges of additional collateral.

38. During the early part of March, 1982, Gonzalez informed Timberlake that Air Florida would not be making a contribution to the Plan. Thus, the Plan was not going to be in a position to satisfy the outstanding Loan obligation on March 26, 1982, the date the Loan was due.

39. On March 15, 1982, Timberlake recommended to Sun Bank that the maturity date of the Loan be extended for a period of 30 days, so that Sun Bank could review the 1981 year-end financial statements for Air Florida.

40. As a result of negotiations between Sun Bank and the Plan, the Promissory Note was renewed, and a renewal note (the "Renewal Note") was purportedly signed by Eli Timoner on June 24, 1982. The Renewal Note was due on March 31, 1983. There is no evidence that Greenberg, Traurig was consulted, advised or even knew of this transaction.

41. Throughout early 1982, Timberlake was of the opinion that Air Florida would survive the financial hardship it was enduring and would continue to be profitable.

42. On June 25, 1982, a member of the executive loan committee of Sun Bank, transmitted a memorandum to Timberlake indicating that he and the other members of the loan committee were concerned about the diminishing value of the collateral pledged to

secure the Loan and of the persistent out-of-margin status of the collateral for the Loan.

43. On July 10, 1982 Timoner suffered a disabling stroke. His duties, both on behalf of Air Florida and on behalf of the Plan were assumed by Lloyd-Jones, who at that time and thereafter was authorized to act on behalf of Air Florida and the Plan.

44. During the last week of July, 1982, as a result of negotiations between Timberlake and Lloyd-Jones, the sum of $297,441.96 which had been held as cash collateral in a repurchase agreement was applied to reduce the outstanding Loan balance of $1.6 million.

45. As a result of the financial difficulties of Air Florida and the persistent out-of-margin status of the collateral pledged to secure the Loan, Sun Bank determined that the prospect of payment of the Loan was impaired. Accordingly, on August 4, 1982 Sun Bank demanded payment of the outstanding principal Loan balance. Payment was demanded by 2:00 p.m., Friday, August 6, 1982. Upon receipt of the demand, Lloyd-Jones referred the matter to Greenberg, Traurig to prepare a response to the demand letters. Seth Joseph, an attorney in Greenberg, Traurig's Corporate Securities Department prepared a response dated August 6, 1982. On August 6, 1982 Sun Bank received the response to its August 4, 1982 letter. In the response, Greenberg, Traurig urged Sun Bank to reconsider its position and threatened legal action if the Loan was foreclosed. On August 9, 1982 counsel for Sun Bank renewed Sun Bank's demand for payment in full of the outstanding Loan balance.

46. After substantial negotiation between the Plan and Sun Bank, on August 16, 1982 the Plan and Sun Bank agreed to amend and redocument the Loan. On August 30, 1982 the Loan was amended and redocumented. The amended and redocumented note was due on March 31, 1983. Lloyd-Jones executed the documents setting forth the redocumentation on behalf of the Plan as Interim Trustee. Greenberg, Traurig represented the Plan and Air Florida in negotiating the legal terms of the agreement with Sun Bank. The final redocumentation, as is customery, required that if any notices were sent from Sun Bank to Air Florida and the Plan, a copy be sent to counsel – Greenberg, Traurig.

47. In October and November, 1982, after the Loan fell out of margin pursuant to the Loan redocumentation, Lloyd-Jones notified Sun Bank that the Western Airlines stock pledged as collateral for the Loan was to be sold, and the proceeds of the sale would be used to partially satisfy the outstanding principal balance of the Loan. Accordingly, on November 15, 1982, the outstanding principal balance was reduced to $602,579.29.

48. During March through July, 1983, after the Plan defaulted on the Loan by failing to pay interest and principal when due, with the consent and cooperation of Lloyd-Jones, Interim Trustee, a portion of the remaining stock collateral was sold and the proceeds of the sale were used to satisfy the outstanding principal Loan balance.

49. On July 28, 1983, Lloyd-Jones was informed that the Loan had been satisfied and that 21,920 shares

of Air Florida preferred stock and 22,140 shares of Air Florida common stock were being returned to the Plan.

50. Commencing in June, 1982, corresponding to the beginning of Lloyd-Jones' tenure, Greenberg, Traurig's relationship as outside counsel to Air Florida diminished and new counsel was retained. By the end of August, 1982, Greenberg, Traurig was no longer counsel to Air Florida. The law firm continued to provide services to the Plan on an as-requested basis. Greenberg, Traurig, pursuant to the notice requirements of the redocumentation, continued to automatically receive copies of correspondence directed to Air Florida and the Plan. However, Lloyd-Jones did not request Greenberg, Traurig to take any action in response to Sun Bank's correspondence.

51. In the last quarter of 1982, Steven Lapidus of Greenburg, Traurig was made aware of the events that had transpired. Though he had been informed during the summer that Air Florida wished to convert the Plan to an ESOP, and had begun to draft the ESOP document, he was unaware of the various guaranties by Air Florida, the pledge of additional collateral, or the reduction of the principal amount of the Loan without a corresponding reduction in collateral.

52. Lapidus, having learned of the Board resolution dated January 22, 1982 sent a letter dated December 23, 1982 setting forth a number of options for Air Florida and the Plan to pursue to correct any violations of ERISA which may have been inadvertently committed in Air Florida's attempt to protect the Plan and Plan participants. The options proposed by Lapidus,

included converting to an ESOP and seeking administrative exemptions from the Department of Labor. Neither Air Florida nor the Plan ever responded to the letter or ever again requested Greenberg, Traurig to perform services.

53. In the summer of 1983, Lapidus learned that Greenberg, Traurig had been replaced as counsel to the Plan by Stanley Kuperstein.

54. Any of the findings of fact which constitute conclusions of law are hereby adopted by the Court as conclusions of law.

CONCLUSIONS OF LAW

1. Plaintiff in this action seeks relief against the various defendants for alleged violations of the Employee Retirement Income Security Act of 1974, P.L. 93-406, 88 Stat. 829, as amended, 29 U.S.C. § 1001, *et seq.* ("ERISA").

2. Counts III, IV, V, VI, VII, VIII, X, XV and XVIII of the second amended complaint ("complaint") seek relief against Sun Bank pursuant to ERISA, claiming violations of Section 29 U.S.C. § 1104 (Fiduciary duties); 29 U.S.C. § 1106 (Prohibited transactions); 29 U.S.C. § 1107 (Limitation with respect to acquisition and holding of employer securities and employer real property by certain plans); 29 U.S.C. § 1108 (Exemptions from prohibited transactions); 29 U.S.C. § 1109 (Liability for breach of fiduciary duty); 29 U.S.C. § 1112 (Bonding).

3. Counts IX and XX of the complaint seek relief against Greenberg, Traurig pursuant to ERISA, claiming violations of 29 U.S.C. § 1106 (Prohibited transactions); 29 U.S.C. § 1104 (Fiduciary duties) and 29 U.S.C. § 1109 (Liability for breach of fiduciary duty).

4. Count VIII of the complaint seeks punitive damages under ERISA, against Timoner, Alvarez, Campbell, Kimberly, Sun Bank and others.[5]

5. Each of the counts alleging liability under ERISA against Sun Bank and Greenberg, Traurig are predicated upon the allegation that Sun Bank and Greenberg, Traurig were, pursuant to 29 U.S.C. § 1002(21)(A), fiduciaries of the Plan. In addition, with regard to Greenberg, Traurig, the complaint alleges as an alternative theory of liability, that Greenberg, Traurig was a non-fiduciary knowingly participating, with a plan fiduciary, in a breach of that fiduciary's duty.[6]

6. As discussed below, the undisputed facts show that as a matter of law, Sun Bank and Greenberg,

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[5] Plaintiff does not seek punitive damages from defendant Greenberg, Traurig.

[6] There is no count in the complaint that alleges that Sun Bank is liable to Useden as a non-fiduciary knowingly participating, with a plan fiduciary, in a breach of that fiduciary's duty. At the hearing on the pending motions for summary judgment, plaintiff, *ore tenus,* moved that the complaint be amended to permit a claim against Sun Bank for non-fiduciary liability under ERISA. The request for such an amendment is denied. Notwithstanding, this Court has found that there is no evidence indicating that Sun Bank knowingly participated in a breach of fiduciary duty.

Traurig were not fiduciaries of the Plan. Moreover, the record is devoid of any evidence indicating that Greenberg, Traurig or Sun Bank knowingly participated in any breach of fiduciary duty owed by the plan fiduciaries.[7]

A. *Standard For Granting A Motion for Summary Judgment*

7. A motion for summary judgment is appropriately granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In addition, a principal purpose of Rule 56 is to isolate and dispose of claims that find no support in the record, thereby permitting their expeditious disposal. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Thus, the mere existence of a factual dispute that lacks sufficient probative value will not defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

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[7] Plaintiff also alleges that Sun Bank is a party in interest. A party in interest involved in a prohibited transaction with a plan may be liable to the plan for "correction" of the prohibited transaction. 29 U.S.C. § 1106(a)(1) (1985); 29 C.F.R. § 2560.502i (1987). Plaintiff has conceded that the only basis for his claim that Sun Bank is a party in interest is his allegation that Sun Bank is a fiduciary. *See* Deposition of Jeffrey Clayton at 426. Therefore, if Sun Bank is not a fiduciary, it is not a party in interest.

B. *Claims for Breach of Fiduciary Duty Under ERISA*

8. Plaintiff's ERISA claims against Sun Bank and Greenberg, Traurig allege that the Bank and the law firm breached their statutory duties as ERISA fiduciaries. For the alleged violations of ERISA, plaintiff attempts to recover damages pursuant to 29 U.S.C. § 1132(a)(2). Sun Bank and Greenberg, Traurig reason that the plaintiff cannot maintain an action against them under ERISA because they are not fiduciaries under the Act.[8]

9. The Act defines a fiduciary:

> [A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such a plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or responsibility in the administration of such plan. 29 U.S.C. § 1002(21)(A).

10. With regard to Sun Bank, to determine whether it is an ERISA fiduciary, the Court must examine whether the Bank had discretionary duties with regard to the Plan. *O'Toole v. Arlington Trust Co.*, 681 F.2d 94 (1st Cir.1982).

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[8] Neither Sun Bank or Greenberg, Traurig were named trustees or fiduciaries to the Plan.

11. Plaintiff maintains that Sun Bank did *not* become a fiduciary when the Loan transaction was consummated, but only became a fiduciary sometime later, when Sun Bank attempted to exercise its rights pursuant to the Loan transaction. Thus, plaintiff recognizes that it is not the existence of the borrower-lender relationship or of the various rights appurtenant to such a relationship – such as the ability of the borrower to demand additional collateral or to declare a default – that give rise to a lender's fiduciary status. Plaintiff argues only that it is the exercise of those rights that give rise to fiduciary status. Moreover, plaintiff claims that the Bank exercised rights over the Plan beyond those rights contemplated in a commercial lending relationship and by doing so became a fiduciary.

12. The establishment of an ordinary commercial debtor/creditor relationship between a lending bank and an ERISA plan and the subsequent exercise of the bank's rights thereunder does not create a fiduciary relationship between the lender bank and the plan.[9]

In *O'Toole v. Arlington Trust Co.*, 681 F.2d 94 (1st Cir.1982), plan assets of a pension plan established by an employer were deposited with a bank, which had also extended loans to the employer. The loans were

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[9] Department of Labor ("DOL") opinions fully support the case law and state that a bank participating in an arms-length commercial transaction with an ERISA plan will not be considered a plan fiduciary or a party in interest. *See* DOL Opinion No. 79-10A (Feb. 12, 1979); DOL Opinion No. 82-049A (Sept. 21, 1982); DOL opinions should be afforded great deference in ERISA cases. *Bradshaw v. Jenkins*, 5 EBC 2754, 2759, fn. 3 (W.D.Wash.1984).

guaranteed by the plaintiffs, who were trustees of the pension plan and officers of the employer. When the bank learned that the employer was in financial difficulty, it used the deposited plan assets to offset the outstanding loan. The trustees of the pension plan attempted to enjoin the improper offset, alleging federal jurisdiction under ERISA. In granting the bank's motion to dismiss, the court found that there was no federal jurisdiction under ERISA because the bank was not an ERISA fiduciary under § 1002(21)(A) and accordingly not chargeable with a breach of fiduciary duty. *Id.* at 95-97. The court found:

> [T]he bank's responsibility as dispository for the pension funds did not include the discretionary, advisory activities described by the statute – activities, which were in fact performed by [the trustees]. In the absence of these activities, it would be unfair to impose on [the bank] the responsibilities and liability created by the statute for fiduciaries.

Id. at 96. The court specifically found that a bank does not become an ERISA fiduciary because it improperly converts assets of a plan (or because it has the ability to do so), reasoning that it was not the intent of Congress to permit federal jurisdiction under ERISA "whenever an incursion of an [ERISA] fund of any sort – by theft or by misappropriation, for example occurred." *Id.* at 97. *See also, Calhoun v. FDIC,* 653 F.Supp. 1288 (N.D.Tex. 1987); *Robbins v. First American Bank of Virginia,* 514 F.Supp. 1183 (N.D.Ill.1981); *Donovan v. Cunningham,* 716 F.2d 1455, 1475 (5th Cir. 1983) *cert. denied,* 467 U.S. 1251, 104 S.Ct. 3533, 82 L.Ed.2d 839 (1984); *Bradshaw v. Jenkins,* 5 EBC 2754, 2760 (W.D.Wash.

1984); *Brandt v. Grounds*, 687 F.2d 895 (7th Cir.1982); and *Hibernia Bank v. Int'l Brotherhood of Teamsters*, 411 F.Supp. 478 (N.D.Cal.1976). Plaintiff has failed to present any authority from this circuit or elsewhere, conferring fiduciary status, pursuant to ERISA, upon a bank that has a commercial lending relationship with an ERISA plan.

Thus, the DOL opinions and applicable case law consistently support the position that a bank, which has no authority to manage or invest plan assets, but merely has possession of plan assets in the context of a depository, custodial, or borrower-lender relationship, is not an ERISA fiduciary. Moreover, a bank exercising its contractual and statutory rights vis-a-vis a plan borrower in a commercial lending relationship does not become a fiduciary of the borrower.[10]

13. The terms of the Loan transaction[11] did not confer fiduciary status on Sun Bank, but only afforded

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[10] This view conforms to another line of authority holding that an entity which exercises discretionary authority or control over plan assets will not be considered a fiduciary under ERISA, if that discretion is limited by a pre-existing framework of policies, practices and procedures. *Gelardi v. Pertec Computer Corp.*, 761 F.2d 1323, 1325 (9th Cir.1985); *Munoz v. Prudential Insurance Co.*, 633 F.Supp. 564, 568 (D.Colo.1986); 29 C.F.R. § 2509.75-8 D-2.

[11] The terms of the Loan transaction included (1) that Sun Bank would possess the collateral, (2) that in addition to the shares of stock purchased, the Loan was secured by 40,000 shares of common stock previously owned by the Plan, (3) that the Promissory Note was a recourse note, (4)

(Continued on following page)

the Bank, in accordance with the commercial relationship embodied in the Loan agreement and the Uniform Commercial Code, the limited right to obtain additional collateral if the value of the stock pledged to secure the loan dropped below the margin requirement and the ability to declare a default and liquidate the collateral on commercially reasonable terms if the provisions of the Loan agreement were breached.[12] Sun Bank had no decision making authority or discretion whatsoever with regard to any aspect of the management, investment or disposition of plan assets. Sun Bank was merely a secured commercial lender that made a loan to a plan, who was entitled to exercise rights and remedies against the plan as borrower, under the terms of the Loan agreement and pursuant to Florida law.

(Continued from previous page)

that Sun Bank was given blank stock powers and S-16 registration rights, (5) that the Note contained an insecurity and additional collateral provisions, and (6) that the parties would be governed by a 70% margin requirement.

[12] The UCC and Florida case law specifically limit a creditor's ability to exercise any discretion or control over pledged collateral outside the framework of a negotiated loan agreement and the UCC. If a secured creditor fails to conform to the mandates of the UCC or acts with misfeasance or malfeasance with regard to the collateral or the debtor, a debtor is provided with remedies under the UCC. *See e.g.* Fla.Stat. § 679.507. Also, under Florida common law, claims such as conversion or negligence may be available for wrongful exercise of dominion and control by a secured party. *See e.g., Gartner v. Atlantic Nat'l Bank of Jacksonville,* 350 So.2d 495 (Fla. 1st DCA 1977), *cert. denied,* 367 So.2d 1122 (Fla.1979). These available remedies demonstrate that a secured creditor does not have discretionary authority or control over a borrower's assets.

14. There is no material fact contained in the record that Sun Bank, in its dealings with the Plan, exceeded its contractual and statutory rights as a lender. The undisputed facts show that Sun Bank acted with respect to the Plan only within the established framework of the transaction and the law and often – as a result of arm's length negotiations upon the request of officials of the Plan and Air Florida – forbore on its rights to the benefit of the Plan.[13] There is no evidence to show that Sun Bank's relationship to the Plan included the discretionary, advisory activities described by ERISA. To adopt plaintiff's view would make it impossible for providers of goods and services (i) to enter into contractual relationships with ERISA plans without becoming fiduciaries and (ii) upon becoming fiduciaries would make it impossible for them to exercise their contractual rights without violating ERISA.

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[13] Assuming *arguendo* that a bank did exceed its bargained for rights as set forth in a loan transaction and as established by Florida law, case law indicates that a bank would nevertheless not become an ERISA fiduciary. Thus, even though the bank in *O'Toole v. Arlington Trust Co.* took plan assets without the authority of the plan trustee to offset an obligation of the plan's sponsor, the bank was not considered to be a plan fiduciary. *O'Toole v. Arlington Trust Co.*, 681 F.2d 94 (1st Cir.1982). Moreover, in *Brandt v. Grounds*, 687 F.2d 895 (7th Cir.1982) a bank that wrongfully disbursed plan assets upon the presentation of forged documents was held not to be an ERISA fiduciary. *See also Nieto v. Ecker*, 845 F.2d 868, 871 (9th Cir.1988) (A party contracting with a plan does not become a plan fiduciary because services were performed negligently or dishonestly.)

15. With regard to Greenberg, Traurig, to determine whether it is an ERISA fiduciary, the Court must examine whether the law firm engaged in any activities that fall within the functional definition of a fiduciary. *Yeseta v. Baima,* 837 F.2d 380 (9th Cir.1988). An attorney who renders legal services or advice to a plan, but does not engage in any fiduciary activities is not a fiduciary under ERISA. 29 C.F.R. § 2509.75-5 (1984).

16. Cases holding that a professional service provider is a fiduciary because he performed fiduciary functions uniformly involve factual situations where the service provider exercised broad authority or control over the plan assets. *See* generally, *Blatt v. Marshall and Lassman,* 812 F.2d 810 (2d Cir.1987) (accounting firm principals were fiduciaries under ERISA by their exercise of actual control over disposition of plan assets); *Stanton v. Shearson Lehman/American Express, Inc.,* 631 F.Supp. 100 (N.D.Ga.1986) (stock brokerage firm could be fiduciary). In cases involving a law firm's liability under ERISA, courts have either held that a lawyer is not a fiduciary, *e.g., Yeseta v. Baima,* 837 F.2d 380 (9th Cir.1988), or proceeded directly to consider liability as a non-fiduciary, believing it to be obvious under the statute that a lawyer is not an ERISA fiduciary.

17. The undisputed facts demonstrate that Greenberg, Traurig did not perform any fiduciary functions. Defendant, Greenberg, Traurig was independent outside counsel to the Plan and merely rendered legal services to the Plan on an as-requested basis. These services consisted of drafting legal documents, interpreting laws, and rendering legal advice to a client.

18. Accordingly, as a matter of law, Sun Bank and Greenberg, Traurig cannot be considered fiduciaries to the Plan, and summary judgment is entered on behalf of Sun Bank and Greenberg, Traurig and against plaintiff.

C. *Claims for Non-Fiduciary Liability Under ERISA*

19. Recent case law suggests that ERISA does not provide a cause of action against non-fiduciaries, non-parties in interest, for alleged participation in a fiduciary's breach of duty. *See e.g., Massachusetts Mutual Life Insurance Co. v. Russell,* 473 U.S. 134, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985); *Nieto v. Ecker,* 845 F.2d 868, 871-874 (9th Cir.1988).[14]

20. ERISA expressly provides various causes of action against fiduciaries who breach their duties to a plan, but contains no express cause of action against non-fiduciaries who participate in a breach of duty by a plan fiduciary. There are cases that support an implied cause of action against non-fiduciaries under ERISA.[15] However, in 1985 the Supreme Court, citing *Cort v. Ash,* 422 U.S. 66, 68, 95 S.Ct. 2080, 2083, 45 L.Ed.2d 26 (1975), clearly indicated that causes of action not

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[14] ERISA, however, does appear to provide certain remedies against non-fiduciaries who are parties in interest who participate in a prohibited transaction with a plan, as party in interest behavior, as opposed to that of a non-fiduciary, non-party in interest, is regulated by ERISA. *See Nieto v. Ecker,* 845 F.2d at 873-874.

[15] *See e.g. Thornton v. Evans,* 692 F.2d 1064, 1078 (7th Cir.1982).

expressly provided for in ERISA should not be implied absent strong evidence that to do so would be consistent with the legislative intent and the statutory scheme of ERISA. *Massachusetts Mutual Life Insurance Co. v. Russell,* 473 U.S. 134, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985). In *Russell,* the Court stated:

> The six carefully-integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted, however, provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly. The assumption of inadvertent omission is rendered especially suspect upon close consideration of ERISA's interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a "comprehensive and reticulated statue."

Id. at 146, 105 S.Ct. at 3092, citation omitted. The only appellate court to address the issue of non-fiduciary liability in light of *Russell,* held that no such cause of action may be implied. *Nieto v. Ecker,* 845 F.2d 868, 871-874 (9th Cir.1988); *See also, Southern California Meat Cutters Unions and Food Employers Pension Trust Fund v. Investors Research Co.,* 687 F.Supp. 506 (C.D.Cal.1988).[16]

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[16] Four other courts of appeals have addressed the issue of non-fiduciary liability since *Russell.* None have considered the impact of *Russell,* and three of the four apparently involve liability of parties in interest. *Brock v. Hendershott,* 840 F.2d 339 (6th Cir.1988); *Fink v. National Savings & Trust Co.,* 772 F.2d 951 (D.C.Cir.1985); *Lowen v. Tower Asset Mgmt. Inc.,* 829 F.2d 1209 (2d Cir.1987); *Whitfield v. Lindemann,* 853 F.2d 1298 (5th Cir.1988).

21. Independently, even if there is a cause of action for non-fiduciary liability under 29 U.S.C. § 1132(a)(3) the record is devoid of evidence indicating that either Sun Bank or Greenberg, Traurig knowingly participated in any breach of fiduciary duty owed by the plan fiduciaries.

22. Under ERISA case law decided without the benefit of a review or consideration of *Massachusetts Mutual Life Insurance Co. v. Russell,* and *Nieto v. Ecker, supra,* to prove that a non-fiduciary participated in a breach of fiduciary duty, one must show (1) an act or omission which furthers or completes the breach of trust by the trustee and (2) knowledge at the time of the transaction that it amounted to a breach of trust. *Freund v. Marshall & Ilsley Bank,* 485 F.Supp. 629, 642 (W.D. Wis.1979).

23. As to the Bank, plaintiff claims that the May 11, 1981 memorandum shows that Sun Bank knew that the initial loan was illegal, and that Sun Bank knew that the guarantees given by Air Florida to secure the Plan's debt were prohibited transactions under ERISA. Moreover, plaintiff attempts to allege that Sun Bank was a non-fiduciary participating in fiduciary breaches as a result of the provision of additional collateral, the reduction of principal and the Loan redocumentation.[17]

24. The record, however, is clear that Sun Bank had no knowledge of fiduciary breaches and many of the fiduciary breaches alieged are not breaches at all. With regard to the May 11th memorandum, plaintiff has

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[17] *See* footnote 6, *supra.*

conceded that Sun Bank believed, based on a legal opinion obtained from Greenberg, Traurig, that the Plan could legally borrow and pledge assets to secure the borrowing. Moreover, neither the acceptance of a guaranty, the pledge of additional collateral, the principal reduction, nor the Loan redocumentation, show that Sun Bank knowingly participated in a breach of fiduciary duty. These facts show only that Sun Bank and the Plan acted as borrower and lender in an arms-length transaction. Plaintiff has failed to come forward with any material fact which shows that defendant, Sun Bank, knew of any violation of ERISA, if such violations indeed occurred.

25. As to Greenberg, Traurig, the cases involving attorneys who knowingly participated in a breach of trust by an ERISA fiduciary involve facts clearly distinguishable from those of the instant case. The cases typically involve an attorney who went beyond the scope of merely rendering legal services, and was actually part of a conspiracy or fraud with Plan fiduciaries in violation of ERISA. *See, e.g., Thornton v. Evans,* 692 F.2d 1064 (7th Cir.1982) (attorney allegedly conspired with others to defraud the fund, made fraudulent representations to the Director of the Arizona Insurance Department, made knowing misrepresentations regarding the status of a bank account, held meetings in his office in furtherance of the conspiracy, and had letters relating to the conspiracy drafted in his office and typed by his secretary); *Donovan v. Daugherty,* 550 F.Supp. 390 (S.D.Ala.1982) (plaintiff alleged that the plan's attorney knowingly participated in, and was personally enriched by a decision by the plan's trustees to

extend coverage to him as a participant in the plan, and to pay him benefits from the plan); *Donovan v. Unicorn Group,* 3 EBC 1665 (S.D.N.Y. 1982) (plaintiff alleged the attorneys for the fund knowingly participated in and profited from breaches of the investment managers of the fund who imprudently made loans and received kick-backs in connection with the loan). The facts of these cases are distinguishable from the very limited involvement of defendant, Greenberg, Traurig, as independent outside counsel to the Plan, which rendered legal services to the Plan on an as-requested basis. Plaintiff has adduced no evidence of Greenberg, Traurig's knowing participation in a conspiracy or fraud with Plan fiduciaries in a breach of fiduciary trust, or personal enrichment. Plaintiff has failed to adduce any facts which indicate that defendant, Greenberg, Traurig, knew of any violations of ERISA at the time such transactions allegedly occurred.

26. Accordingly, the plaintiff has adduced no facts to establish that Sun Bank and Greenberg, Traurig knowingly participated in a fiduciary's breach of duty, and as a matter of law, summary judgment is entered on behalf of Sun Bank and Greenberg, Traurig and against the plaintiff.

D. *Claim for Punitive Damages*

27. This Court holds that punitive damages are not awardable to the plaintiff as a matter of law. *Massachusetts Mutual Life Insurance Company v. Russell,* 473 U.S. 134, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985); *Bishop v. Osborn Transportation, Inc.,* 838 F.2d 1173

(11th Cir.1988); *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc.*, 793 F.2d 1456 *rehearing denied*, 797 F.2d 977 (5th Cir.1986), *cert. denied*, 479 U.S. 1034, 107 S.Ct. 884, 93 L.Ed.2d 837 (1987); *Sokol v. Bernstein*, 803 F.2d 532 (9th Cir.1986); *Foltz v. U.S. News & World Report, Inc.*, 627 F.Supp. 1143 (D.C.Cir. 1986); *Powell v. Chesapeake & Potomac Telephone Co. of Virginia*, 780 F.2d 419 (4th Cir.1985) *cert. denied*, 476 U.S. 1170, 106 S.Ct. 2892, 90 L.Ed.2d 980 (1986); *Varhola v. Doe*, 820 F.2d 809 (6th Cir.1987).

28. Moreover, as a matter of law, no fact in this case warrants the imposition of punitive damages.

29. Accordingly, plaintiff's claim for punitive damages against Timoner, Alvarez, Campbell, Kimberly and Sun Bank is dismissed.

E. *Late Filed Supplement to Local Rule 10 J Statement, Affidavit and Motion for Continuance or Extension of Time for Filing Affidavits*

30. Plaintiff's supplement to 10 J statements of material and disputed facts directed to defendants, Alvarez, Lloyd-Jones, Sun Bank, Timoner and Greenberg, Traurig, served at the hearing on the motions for summary judgment on December 15, 1988, is hereby stricken as it was not served within the time frame established by Local Rule 10 J(2). *Clinkscales v. Chevron USA, Inc.*, 831 F.2d 1565 (11th Cir.1987).

31. The affidavit of Donald Lloyd-Jones served by the plaintiff on defendant, Greenberg, Traurig on

December 15, 1988, is stricken as it was untimely and its submission would prejudice the defendants. *Clinkscales v. Chevron USA, Inc.*, 831 F.2d 1565 (11th Cir.1987).[18]

32. For the reasons stated above, plaintiff's motion for continuance or extension of time for filing affidavits served at 5:00 p.m. on December 15, 1988, is denied. *See Jones v. Darin & Armstrong, Inc.*, 785 F.2d 1521 (11th Cir.1986).

F. *Plaintiff's Motion for Partial Summary Judgment and Sanders Campbell's Motion for Summary Judgment*

33. Plaintiff's motion for partial summary judgment as to defendants, Sun Bank and Greenberg, Traurig, for the reasons set forth above, is denied.

34. Plaintiff's motion for partial summary judgment as to defendants, Timoner, Alvarez, Campbell and Kimberly is hereby denied as there are issues of fact which remain to be adjudicated, which precludes the entry of summary judgment.[19]

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[18] At the hearing on December 15, 1988, this Court was advised that defendant, Donald Lloyd-Jones and the plaintiff entered into a settlement agreement regarding the issues involved in this litigation.

[19] Although defendant Alvarez's motion for partial summary judgment raised only the punitive damage issue, for the reasons set forth above in the discussion of plaintiff's claims against Greenberg, Traurig, Plaintiff's claims against

(Continued on following page)

35. Defendant, Sanders Campbell's motion for summary final judgment, served on November 24, 1987 is hereby denied, as the plaintiff has come forward with sufficient evidence that requires a determination by a finder of fact.

G. *Statute of Limitations*

36. The Court reserves ruling on the issue of the statute of limitations. The Court will postpone setting a trial date for the trial involving defendants, Timoner, Alvarez, Campbell and Kimberly pending the resolution of the issue of the statute of limitations.

37. Any of the foregoing conclusions of law which constitute findings of fact are hereby adopted by the Court as findings of fact.

DONE AND ORDERED.

(Continued from previous page)

defendant Alvarez are also not supportable to the extent, that they involve Alvarez's tenure at Greenberg, Traurig. Therefore, the claims that remain against Alvarez are limited to the period of time that Alvarez was a full-time employee of Air Florida.

Neil A. USEDEN, etc., Plaintiff,

v.

C. Edward ACKER, et al., Defendant.

No. 85-0002-CIV.

United States District Court,
S.D. Florida,

Aug. 31, 1989.

SECOND ORDER ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

RYSKAMP, District Judge.

This cause is before the court upon various defendants' motions for summary judgment. In its earlier order of March 29, 1989, 721 F.Supp. 1233, the court reserved ruling on a number of issues. This order will dispose of all remaining issues. The summary judgment questions remaining are (1) the argument by Sun Bank of Miami, N.A. and Sun Bank, Inc. ("Sun Bank") that there is no private right of action pursuant to Regulation U of the Securities and Exchange Act of 1934 and that it is not subject to ERISA bonding requirements and (2) the claim by Greenberg Traurig Askew Hoffman Lipoff Rosen & Quentel ("Greenberg Traurig"), Eli Timoner, and Cesar Alvarez that this action is barred by the applicable statute of limitations. For the reasons that follow, the motion for summary judgment on Regulation U and the bonding requirements will be granted and the motions for summary judgment on the statute of limitations will be denied. The court's Rule 54(b)

order of May 16, 1989 will be vacated and the court will now direct that final judgment be entered.

I. Applicable Facts

This case involves a number of claims by plaintiff, Neil Useden, as trustee for the Air Florida System, Inc. Profit Sharing Plan and Trust ("the Plan"), against the Plan's former trustees, lawyers, bankers, etc. The claims are brought pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, and are primarily based on violations of fiduciary duties. For a complete statement of applicable facts, refer to this court's order of March 29, 1989.

II. Legal Analysis

A. Regulation U and Bonding Requirements

In Count XVIII of the Complaint, plaintiff contends that Sun Bank violated Regulation U, at 12 CFR § 221, by loaning the plan in excess of 50% of the value of the collateral pledged to secure the loan. Sun Bank contends there is no private right of action under the Securities and Exchange Act of 1934 for violations of Regulation U. In an earlier order denying a motion to dismiss, this court recognized its broad authority to fashion remedies under ERISA, *Donovan v. Mazzola,* 5 E.B.C. 2731 (N.D.Cal.1984), but this does not include the power to *create* a cause of action.

The court will not engraft a remedy on a statute that Congress did not intend to provide. *California v. Sierra Club,* 451 U.S. 287, 297, 101 S.Ct. 1775, 1781, 68

L.Ed.2d 101 (1981). The Supreme Court was reluctant to tamper with the carefully crafted ERISA enforcement scheme by creating a cause of action for extra-contractual damages in *Massachusetts Mut. Life Ins. Co. v. Russell,* 473 U.S. 134, 147, 105 S.Ct. 3085, 3092, 87 L.Ed.2d 96 (1985). Similarly, this court cannot find that ERISA creates a private right of action for a violation of Regulation U, where neither ERISA or the securities law specifically provide for a cause of action.

Plaintiff contends that Sun Bank violated Regulation U by improperly valuing the loan collateral and by failing to obtain a signed U-1. It is unnecessary for the court to determine whether Sun Bank did violate Regulation U, because the court has concluded that there is no private cause of action under ERISA for a violation of Regulation U and that Sun Bank is entitled to judgment at a matter of law.

The court, in its prior order on the motions for summary judgment, found that Sun Bank was not a fiduciary with respect to the plan. Therefore, Sun Bank cannot be liable for a violation of 29 U.S.C. § 1112 by "handling trust property without being bonded." Summary judgment as to Count XV of the Second Amended Complaint will be entered in favor of Sun Bank.

B. Statute of Limitations

Defendants Greenberg Traurig, Eli Timoner, and Cesar Alvarez argue that ERISA's three year actual knowledge statute of limitation, at 29 U.S.C. § 1113(a)(2), bars plaintiff's claims against them. Timoner contends the statute begins to run from the time

that Useden became aware of the facts giving rise to his claim and that Useden had actual knowledge prior to January 2, 1982 through his rule as the actuary for the plan. Greenberg Traurig and Alvarez argue that the prior trustee had knowledge of the possible violation and the three year statute of limitation applies to bar Useden's claims unless there is evidence of fraud or concealment. *Schaefer v. Arkansas Medical Society,* 853 F.2d 1487 (8th Cir.1988); *Kwak v. Joyce,* 683 F.Supp. 1546 (N.D.Ill.1988).

Plaintiff argues that his claims are controlled by the general limitation period, Section 1113(a)(1), and not the actual knowledge period. Section 1113(a)(1) provides that any claim for a fiduciary's breach must be brought within six (6) years after the date of the last action which constituted a part of the violation. A six (6) year limitation period is also available in the case of fraud or concealment, although neither has been alleged in this case. 29 U.S.C. § 1113(a).

The Eleventh Circuit, in *Brock v. Nellis,* 809 F.2d 753 (11th Cir.1987), recognized that the rather extended general limitation period was intended to impress upon fiduciaries the importance of the trust they hold. *Id.* at 754. "Congress evidently did not desire that those who violate that trust could easily find refuge in a time bar." *Id.* The three year exception is applicable only when plaintiff has actual knowledge of an ERISA violation. *Id.* at 755. According to the court, "it is not enough that he had notice that something was awry; he must have had specific knowledge of the actual breach of duty upon which he sues." *Id.* Once plaintiff learns of the facts that support his allegation

of illegality, he has no more than three years to file suit. *Id.*

In *Brock,* the Secretary of Labor (who is also authorized to sue on an ERISA violation) was aware more than three years prior to bringing suit that the pension fund had paid an exaggerated price for a foreclosed property. *Brock,* 809 F.2d at 754. But because there was no direct or circumstantial evidence that the Secretary ever knew about the defendants participation in the transaction, the court held that the Secretary did not have actual knowledge and that the three-year period was inapplicable. *Id.*

In the Eleventh Circuit, the shorter, three-year exception to the general ERISA statute of limitations will apply only if plaintiff had actual knowledge of the defendants' involvement in the purported ERISA violations. On a motion for summary judgment, the moving party bears the burden of showing the court how the pleadings and other submissions demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Thus, Timoner, Greenberg Traurig, and Alvarez must show that the undisputed facts show that Useden had actual knowledge of the facts giving rise to ERISA violations and knowledge of each of the defendants' involvement in the violations. A fiduciary who violates the trust placed in him by the Plan will not easily find protection from a time bar. *Brock,* 809 F.2d at 754.

Timoner contends that, as an actuary for the plan, Useden was aware of all the facts necessary to his

claim. He argues that Useden's knowledge of the loan made in 1981, his review of financial statements and the 1980 Form 5500, his general knowledge of the airline industry and the economic climate of that time, and his regular contacts with Air Florida principals show that Useden was aware of the ERISA violations and that the three-year period should apply. This evidence is insufficient to meet the Rule 56 summary judgment burden. While defendant presents strong evidence, the court cannot make the leap of faith necessary to conclude that Useden had actual knowledge of Timoner's involvement in the ERISA violations. Useden's familiarity with these documents and his deposition testimony do not conclusively prove that he had actual knowledge of the facts giving rise to this claim. Further, even if Useden did actually know in 1981 that Timoner was involved in possible violations of his fiduciary duties, there is evidence that Timoner and the Plan could correct the illegalities within a certain time period. In any case, enough factual questions remain to preclude summary judgment on the issue of the applicable statute of limitations as to Timoner.

Greenberg Traurig and Alvarez contend that Donald Lloyd-Jones' actual knowledge of ERISA violations while he was trustee should be imputed to the successor trustee, Useden. The court cannot accept this reasoning. The knowledge of the actual plaintiff, Useden, will determine whether to apply the three-year or the six-year limitation period.

The court is not persuaded by the cases cited by defendants, in which various statutes of limitation were

not tolled even where there was a "conflict of interest." *See Landreth v. United States,* 850 F.2d 532 (9th Cir.1988); *Sweitlik v. United States,* 779 F.2d 1306 (7th Cir.1985); *Pittman v. United States,* 341 F.2d 739 (9th Cir.1965). Defendants have not met this burden. Defendants' primary evidence in support of their motion is a letter from Steven Lapidus, of Greenberg Traurig, to Don Hays, of AFS, which discusses possible illegalities surrounding Air Florida's guarantee of a loan from Sun Bank to the Plan. While the letter, which apparently was copied to Neil Useden prior to his becoming trustee, presents many of the facts that form the basis of plaintiff's claims, it does not explain the defendants' involvement in the violations and does not establish, as a matter of law, that plaintiff had actual knowledge of defendants' involvement. While persuasive, the evidence is not compelling and material issues of facts remain to be resolved by the factfinder.

III. Conclusion

After a careful review of the pleadings and the court being fully advised in the premises, it is hereby:

ORDERED and ADJUDGED that:

(1) Sun Bank's motion for summary judgment on Regulation U and ERISA bonding requirements is GRANTED. This disposes of all of plaintiff's claims against defendant Sun Bank;

(2) All other defendants' motions for summary judgment on the statute of limitations are DENIED; and

(3) The court's May 16, 1989 order, granting plaintiff's motion for a Rule 54(b) order, is VACATED. As all of plaintiff's claims against Sun Bank and Greenberg Traurig have been adjudicated by today's order and the court's order of March 29, 1989, the court determines, in accord with Rule 54(b), that there is no just reason for delay and directs the Clerk that SUMMARY FINAL JUDGMENT BE ENTERED, pursuant to Rule 58, in favor of defendants Sun Miami and Sun Bank and Greenberg Traurig. Immediate entry of final judgment is necessary for an immediate appeal and speedy appellate review of the questions decided by the court will promote judicial economy by avoiding a second trial should the judgment be reversed on appeal.

DONE and ORDERED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-5445

NEIL A. USEDEN, as Trustee of the Air Florida System, Inc., Profit Sharing Plan & Trust,

Plaintiff-Appellant,

versus

C. EDWARD ACKER, et al.,

Defendants,

GREENBERG, TRAURIG, HOFFMAN, LIPOFF, ROSEN & QUENTEL, P.A., SUN BANK OF MIAMI, N.A. and SUN BANK, INC.,

Defendants-Appellees.

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Filed Mar. 4, 1992)

Before: HATCHETT, BIRCH, Circuit Judges, and RONEY, Senior Circuit Judge.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of

Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

. . . .

ENTERED FOR THE COURT:

/s/ illegible
UNITED STATES CIRCUIT JUDGE